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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

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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 PETITION FOR REVIEW OF LBP-94-6
AND/OR MOTION FOR DIRECTED CERTIFICATION

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March 24, 1994

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INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.786(b)(iii) and (g)(1), the NRC Staff petitions the Commission for review or, in the alternative, for directed certification of questions pertaining to LBP-94-06, 39 NRC ____ (served March 4, 1994).¹ The Licensing Board, *inter alia*, ordered the Staff to (1) promptly release to Georgia Power Company (GPC or Licensee) and Allen Mosbaugh (Intervenor) all of the easy-to-separate factual information contained in the Office of Investigations (OI) Report on Case No. 2-90-020R, dated December 17, 1993, 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 Staff does not seek to prevent the release of the OI Report, but only seeks a limited delay to allow the Commission to determine whether to institute enforcement action.

¹ The certificate of service states that LBP-94-06 was served on the Staff and parties by first class mail. See 10 C.F.R. §§ 2.786(b)(1) and 2.710.

The Board erred in finding that the parties' need for the discovery outweighed the Staff's need for a *limited deferment* of the production of the OI Report and factual information until after consultation with the Commission on possible enforcement action. Commission review is now appropriate because the premature release of the information (particularly to those investigated) threatens an immediate and serious irreparable impact on the Commission's deliberative process concerning an enforcement action. See 10 C.F.R. § 2.786(g)(1). Moreover, the ruling raises substantial and important questions of law and policy. See 10 C.F.R. § 2.786(b)(iii). Specifically:

1. Whether an OI Report (including factual and privileged information contained in or supporting it) should be produced in discovery, absent overriding need, to the parties involved in the events surrounding the allegation (Licensee and Intervenor) before the Commission determines whether and what enforcement action is appropriate; and
2. Whether the order to release the OI Report without first hearing an *in camera*, *ex parte* presentation by the Staff and before the Commission completes its deliberations on possible enforcement action was consistent with Commission policy.²

In light of the importance of this matter to the Commission's deliberative process and regulatory responsibilities with respect to enforcement actions, the Commission should accept interlocutory review, grant certification and rule that, consistent with the Policy Statement, the OI Report and factual information should not be released during the pendency of agency enforcement deliberations.³

² "Statement of Policy: Investigations, Inspections, and Adjudicatory Proceedings," 49 Fed. Reg. 36,032 (1984) (Policy Statement).

³ In the "NRC Staff Motion for a Stay of the Licensing Board Order Releasing the Office of Investigations Report, March 14, 1994, at 10, the Staff argued that the report
(continued...)

BACKGROUND

In a report, dated December 17, 1993, OI documented its investigation of whether GPC's reporting of diesel generator starts in 1990 involved wrongdoing. In filings dated January 24 and February 4, 1994, the Staff sought a short deferral of release of the OI Report until the Staff had evaluated the OI Report for possible enforcement action and consulted with the Commission on any action proposed.⁴ The latter filing was accompanied by the Affidavit of James M. Taylor, Executive Director for Operations (EDO Affidavit), and stated that the OI Report was still being evaluated to determine whether enforcement action was appropriate and, thus, should be withheld as a predecisional document pending Commission consideration of whether to institute an enforcement action. Staff Brief at 2-3, 5-6. The Staff also offered to produce the report *in camera*, and stated that release under a protective order would not adequately protect

³ (...continued)

should not be released until after completion of Commission deliberations. In support of its motion, the Staff cited the Commission's inherent authority over NRC proceedings and the Commission's authority to stay proceedings pending Commission review under 10 C.F.R. § 2.788. *Id.* at 4, 7, 10. In this proceeding, the Commission has previously stated that interlocutory review can be sought where the requisite criteria are met. CLI-93-6, 37 NRC 174, 174 (1993).

⁴ NRC Staff Motion to Defer Certain Prehearing Activities Until the Staff Has Formulated a Position, dated January 24, 1994 (Deferral Motion); NRC Staff Brief on Release of the OI Report Requested in Licensing Board Order of February 1, 1994, dated February 4, 1994 (Staff Brief). The Staff had previously requested deferral of release of OI information during the pendency of the OI investigation and Commission review of any proposed enforcement action. *See, e.g.*, NRC Staff Response to Georgia Power Company's Motion to Compel Production of NRC Staff Documents, dated August 26, 1993 (disclosure not warranted under the Policy Statement and 10 C.F.R. § 2.790(a)(5) and (7)); NRC Staff Motion for a Further Extension of Time to Defer Discovery of Documents to the Licensee, dated October 27, 1993.

the predecisional process as GPC was the subject of possible enforcement action and the Intervenor was involved in matters investigated in the OI Report. Deferral Motion at 3-5; Staff Brief at 5; EDO Affidavit at 2-3.

After conducting an informal status conference on March 1, 1994, the Board, without examining the OI Report, ordered the Staff to promptly release the Report's easy-to-separate, non-privileged factual information in the OI Report,⁵ and to release the remainder of the report on April 4, 1994, subject to a protective order. LBP-94-06, *supra* at 9.⁶

ARGUMENT

I. The Board's Ruling is Contrary to the Commission's Policy Statement

The Executive Director for Operations has indicated that release of the OI Report, even under a protective order, should be delayed until after the Staff consults with the Commission on whether to institute an enforcement action. EDO Affidavit at 2-3;

⁵ Because the Board has previously requested that the Staff consider voluntarily releasing GPC interviews, Staff interviews, and other exhibits to the OI Report, the Board's ruling encompasses such documents even if cited in, but not appended to, the report. See Memorandum and Order (Prehearing Conference Order: Schedule), dated February 1, 1994 (unpublished). The Staff had previously produced in December 1993 (1) forty-four tape recordings provided by Intervenor to the NRC, (2) transcripts of these tape recordings and (3) other documents evidencing statements by Intervenor to the NRC. Because Intervenor only recently asked for copies of tapes and transcripts, the materials were dispatched by a letter from Carolyn Evans, NRC, dated February 24, 1994.

⁶ Among the Board's findings were (1) that the Policy Statement was inapplicable because it only protects the unrestricted release of information which would prejudice an ongoing inspection or investigation, or reveal a confidential source and (2) the weighing of the four factors showed that the Staff's harm was not tangible, but delay would harm the other parties and a prompt determination in the proceeding. LBP-94-06 at 3-9.

Disclosure of an OI Report and factual information before enforcement action is taken is contrary to long standing agency practice⁷ and the spirit of the Policy Statement, 49 Fed. Reg. 36,032, 36,033. A limited delay would enable the Commission and the Staff to deliberate on possible enforcement action stemming from the GPC conduct examined in OI's investigation of wrongdoing without the harm caused by premature release of Commission deliberative materials.⁸ The Staff has now forwarded its

⁷ 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 allegor, 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.

⁸ Even if there is ample precedent to support the Board's view that the deliberative process privilege does not protect purely factual information, courts have noted that there may be instances where factual information may be withheld. See, e.g., *Mead Data Central, Inc. v. Department of Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977) ("the disclosure of even purely factual information may so expose the deliberative process within an agency that it must be deemed exempted by section 552(b)(5)") and cases cited therein. For example, in *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68-71 (D.C. Cir. 1974), it was held that, inasmuch as the exemption protects deliberative materials and the deliberative process, a staff assistant's factual summaries or material of public record that were prepared to aid the EPA Administrator in formulating his decisions and final order were exempt from disclosure under FOIA. There the Administrator had rendered a decision setting forth in detail the basis for his decision and citing voluminous facts. *Id.* at 68. Because an OI Report is more than a statistical compilation of data, reflects the investigator's perspectives on and selection of evidence, and is an integral part of Commission enforcement deliberations, it should not be prematurely released absent an overriding need for the information. See *Founding Church of Scientology v. Director, FBI*, 104 F.R.D. 459, 464-66 (D.D.C. 1985) (motion to compel discovery after examining the information *in camera* and determined that the materials involved the deliberative process of government officials in the criminal process, which was at the time predecisional as to prosecution and other law enforcement decisions, and the movant had not shown relevance or adequate need for the documents).

recommendation of whether the OI Report warrants any enforcement action to the Commission.

The issue is not whether, *but when*, to release the facts and analysis in the OI report since the Staff does not seek absolute protection for the report. The premature disclosure of the facts and views reflected in the OI Report and supporting documentation to the parties 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, as it would give this material to the subject of the investigation before the Commission acts. *See* EDO Affidavit at 2-3. The Licensee and Intervenor would be able to inquire behind the agency's investigative views and facts concerning potential violations before the NRC has taken a position on what enforcement action, if any, is appropriate. Thus, premature disclosure to the subject of an investigation could divert Commission resources from enforcement deliberations and expose the Commission's deliberative process such that possible enforcement action is delayed or compromised.

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 compromise investigations and inspections. 49 Fed. Reg. 36,032. The need to avert the consequences of premature disclosure is addressed in Commission guidelines for the consideration of such material *in camera* and, in certain

instances, on an *ex parte* basis, "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. While the OI investigation of the allegations raised by Intervenor is now complete, the need to protect the integrity of the Commission's deliberative process should temporarily outweigh a party's need for disclosure. As the Policy Statement indicates, 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).⁹ Furthermore, the Commission has stated that "[d]ue 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.* A temporary deferral of release of the OI Report and factual information until the agency completes its enforcement deliberations is appropriate and should have been granted as it would serve the public interest in having the NRC discharge its enforcement obligations

⁹ 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.

without the distractions or confusion caused by the premature release of preliminary agency enforcement materials.

Inasmuch as the Board ordered premature release of the OI Report contrary to Commission policy and practice, and without hearing an *in camera* presentation by the Staff or referring the matter to the Commission, *see* 49 Fed. Reg. 36,032; 10 C.F.R. § 2.744(c), the Board erred in ordering disclosure of the facts and analysis in the OI Report. Therefore, the Commission should (1) reverse the Board's ruling requiring release of the report prior to completion of the Commission's enforcement deliberations and (2) rule that the answer to the certified questions is that the Policy Statement and the need to protect the Commission's deliberative process warrants the nondisclosure of the OI Report and factual information pending Commission consideration of a Staff enforcement proposal.

II. The Board Misapplied the Balancing Test in Denying the Requested Delay

The Board erroneously found that a balancing of the four-factor test used in LBP-93-22, 38 NRC 189, 193 (1993),¹⁰ supported the prompt release of both the factual information and the opinions contained in the OI Report. LBP-94-06 at 8. Specifically, the Board should not have found that the parties' need for discovery of the information outweighed the potential harm to the Commission's deliberative process for the limited delay sought. 1) Because the Staff has now submitted its enforcement paper to the Commission, the length of the delay during Commission deliberations is not likely to be

¹⁰ These factors are (1) the length of the delay, (2) the reason for the delay, (3) the right to a prompt proceeding, and (4) prejudice resulting from a delay.

long. 2) A limited delay will protect the Commission's deliberative process from the intrusions of discovery by those investigated and unnecessary distractions from enforcement activities. See Staff Brief at 5; EDO Affidavit at 2-3; Deferral Motion at 3-5. 3) Limited deferral of release of the report will have a minimal effect on the right to a prompt proceeding. The issuance of an enforcement action could affect the Staff's position in this proceeding, the scope of discovery and the scope of the other parties' cases. Thus, the requested delay could assist a prompt determination in this proceeding. 4) The parties are not prejudiced by the limited deferral¹¹ as considerable information, including the audio tape recordings released in December 1993, is available to the parties for discovery, and prehearing preparation can continue without now releasing the OI Report.¹² Intervenor is not prejudiced as delay would be consistent with his opposition to the proposed amendments. Until this proceeding is resolved, action on those

¹¹ Intervenor's harm asserted below should be viewed as an attempt to avoid the burden of litigating its contention. Intervenor's Brief Concerning the Release of NRC Office of Investigations Report No. 2-90-020R, dated February 4, 1994 (Intervenor's Brief), at 4. Not only did counsel for Intervenor fail to avail himself of the tapes, transcripts and other information made available in December 1993, but he also remained content, until recently, to rely on the six tapes containing excerpts from other recordings, arguing that the OI report would provide a "road map" for his case. See Tr. 189; Intervenor's Brief at 15. This position is hardly consistent with fairness and fulfillment of the responsibility of a party. See *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 453-54 (1981).

¹² Intervenor's tape recordings formed the basis for OI's investigation and he has first hand knowledge about the voices and conversations recorded. 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. In addition, pretrial activities are currently proceeding, including work on detailed stipulations concerning the alleged illegal transfer, the diesel generator reporting issue and tape transcripts as proposed by GPC in letters of John Lamberski, dated February 3, 1994, February 28, and March 1, 1994.

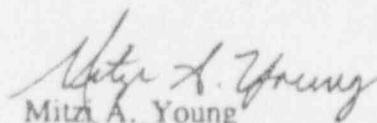
amendments is deferred. See CLI-93-15, 38 NRC 1, 3 (1993). In addition, since much information is known to both parties because they were involved in the events investigated and protection of the public interest requires that the Commission's deliberative process concerning possible enforcement action be protected, there was no overriding need for the premature release of the OI Report.

Given the posture of the agency's enforcement deliberations and the harm to the Commission's deliberative process, the Board accorded too little weight to the harm caused by premature disclosure of the facts and preliminary agency views used to reach an NRC enforcement determination.¹³ The need for a prompt hearing should not override the harm to NRC enforcement deliberations during the limited period requested.

CONCLUSION

For the foregoing reasons, the Commission should grant interlocutory review, reverse LBP-94-06, and answer the questions certified such that discovery of the OI Report is deferred until the Commission determines whether enforcement action is appropriate.

Respectfully submitted,


Mitzi A. Young
Counsel for NRC Staff

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

¹³ The public is best served by the Staff fulfilling its regulatory obligations without (a) the diversion of NRC resources to engage in prehearing 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.

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(Vogtle Electric Generating Plant) Re: License Amendment
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF PETITION FOR REVIEW OF LBP-94-6 AND/OR MOTION FOR DIRECTED CERTIFICATION" 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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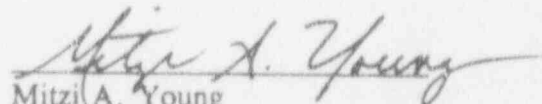
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