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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of)	Docket Nos. 50-424-OLA-3
)	50-425-OLA-3
GEORGIA POWER COMPANY,)	
et al.)	Re: License Amendment
)	(Transfer to Southern
(Vogtle Electric Generating)	Nuclear)
Plant, Units 1 and 2))	
)	ASLBP No. 93-671-01-OLA-3

GEORGIA POWER COMPANY'S RESPONSE TO
NRC STAFF MOTION FOR A STAY OF THE LICENSING BOARD ORDER
RELEASING THE OFFICE OF INVESTIGATIONS REPORT

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March 21, 1994

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I. INTRODUCTION.

Georgia Power Company ("GPC") opposes the NRC Staff Motion for a Stay of the Licensing Board Order Releasing the Office of Investigations Report, dated March 14, 1994 ("Staff's Motion"), with respect to easy-to-separate factual information. The Staff's Motion makes no distinction between portions of the Office of Investigations ("OI") Report which are purely factual information collected by the OI investigator and portions which make up the investigator's opinions and conclusions. This distinction is critical given that no privilege exists under which the Staff may withhold purely factual information. With this in mind, GPC had purposely limited its request to factual information associated with the OI Report.

II. BACKGROUND.

On January 3, 1994, the NRC Staff notified the Licensing Board 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 on OI Case No. 2-90-020R and the report is currently being reviewed by the NRC staff to determine whether enforcement action is appropriate." Board Notification 94-01.^V

^V On February 22, 1994, the NRC Staff issued another Board Notification, No. 94-03, which stated that "[a] joint review has been conducted by members of Office of Enforcement, Office of Nuclear Reactor Regulation, Region II, and the Office of General Counsel to evaluate and analyze the OI report. This group has provided a report analyzing the evidence and presenting its conclusions for consideration by senior-level NRC managers."

During a prehearing conference on January 27, 1994, counsel for Intervenor requested that the NRC Staff release the entire OI Report so that he might use it as a "road map" for his case. Tr. 157-59. On the other hand, GPC has not requested the release of the OI Report. Tr. 159, 161. Instead, GPC seeks and has requested only the OI records of interviews of NRC Staff personnel and the transcripts of OI's interviews of GPC personnel. Tr. 163, 188-89. These factual interviews were identified as the "26 Exhibits" in an affidavit of OI investigator Larry Robinson attached to the NRC Staff Response to Georgia Power Company's Motion to Compel NRC Staff Response to Certain Interrogatories, dated January 21, 1994.² GPC believes that if it receives such records and transcripts, which are "factual material," it would have all the factual information necessary to reach its own conclusions concerning the allegations which OI investigated. Tr. 163, 188-89. Discovery on all matters could then proceed in this case.

The NRC Staff opposed Mr. Kohn's position that the OI Report should be released. The Staff asserted that the report was pre-decisional and that its release at this time may be used to damage the reputations of personnel of GPC and Southern Nuclear. Tr. 168-69. With respect to the release of factual information,

² GPC notes that counsel for the NRC Staff stated at the January 27, 1994, conference: "we intend to supplement that old interrogatory, because there were additional interviews." Tr. 204. GPC's request for the 26 Exhibits should be read to include interview records of NRC Staff personnel which have not yet been identified by the Staff.

including the 26 Exhibits, counsel for the NRC Staff indicated that they would have to consult with Staff management before the Staff could express a position on the release of such information. Tr. 203-04, 228-30.

On February 1, 1994, the Licensing Board issued a Memorandum and Order (Prehearing Conference Order: Schedule) which provided, in pertinent part:

2. By COB Friday, February 4, 1994, the Board and the parties will receive any briefs that the parties may submit concerning Intervenor's request that the Board should release the entire OI Report, with or without protective orders, and whether the Board should conduct an in camera status briefing by the Staff (including the presentation of documents in camera) prior to determining whether to release allegedly privileged Staff documents.

3. By COB Friday, February 18, 1994, the Staff will inform the parties and the Board whether it will release in discovery any or all of the factual attachments or exhibits^{2/} (not involving the Staff's evaluation or its policy conclusions) to the Office of Investigation Report concerning the Vogtle Diesel-Generator Allegations.

^{2/}We note that Georgia Power requested the 26 exhibits identified by Mr. Robinson in response to Georgia Power's Interrogatory to the Staff, Number 10, and the Board has enlarged the Georgia Power request in the interest of fairness and efficiency. Tr. 228-229. See also, Mr. Kohn, at p. 230.

On February 4, 1994, each of the parties filed a brief in response to the Board's February 1, 1994, Order. On March 3, 1994, the Board issued a Memorandum and Order (Discovery Related to Office of Investigation Report), LBP-94-06, which ordered that:

1. The Staff of the Nuclear Regulatory Commission (Staff) shall promptly release to Georgia Power and Allen L. Mosbaugh all of the easy-to-separate^{1/} 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.

2. On April 4, 1994, the Staff shall release the remainder of the Office of Investigation's Report, subject to protective order.

3. The Staff shall promptly serve a proposed form of protective order on the parties and the Board.

"Since the whole report will be released, the Staff should review it and release portions that they can reasonably determine to be factual, without extensive editing and redacting.

III. DISCUSSION.

A. The NRC Staff's Withholding of the Factual Information Associated with the OI Report is Contrary to Law.

The Board's March 3, 1994, Order (LBP-94-06), at 3-5, correctly states the law respecting the NRC Staff's right to withhold relevant documents in an NRC adjudicatory proceeding on the basis of the deliberative process exemption. The Board held that "[i]t is settled law that factual material 'must be segregated and released unless 'inextricably intertwined' with privileged communications, or the disclosure of such factual material would reveal the agency's decision making process.'" Id. at 5 citing Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 N.R.C. 1333, 1341 (1984).

The Staff has made no effort to comply with the Board's order concerning the release of factual information contained in the OI Report. Nor has the Staff taken the position that it is not possible to segregate and release such factual information or that the release of such factual information would reveal the agency's decision-making process. Instead, the Staff's Motion, filed on March 14, 1994, seeks a stay of LBP-94-06 on the grounds

that "special circumstances [are] 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." Staff's Motion at 4 citing Pacific Gas & Electric Co. (Diablo Canyon Power Plant, Units 1 and 2), CLI-86-12, 24 N.R.C. 1, 4-5 (1986). However, no special circumstances are apparent from the Staff's Motion.

In support of the extraordinary exercise of the Commission's supervisory authority, the Staff asserts that release of the OI Report before enforcement action is taken, if any, (1) would be contrary to long-standing agency practice concerning the timing of the release of investigative reports and to the spirit of the Statement of Policy; Investigations, Inspections, and Adjudicatory Proceedings, 49 Fed. Reg. 36032, 36033 (1984), and (2) could adversely affect the ability of the Commission and its Staff to deliberate concerning whether to institute an enforcement action. Staff's Motion at 5. In the alternative, the Staff argues that a stay of the release of the OI Report should be granted under the four-factor test for the granting of stays set out in 10 C.F.R. § 2.788(e). Id. at 7.

The arguments in the Staff's Motion revolve around a single conclusory assertion: that the release of the OI report, including factual information contained therein or appended thereto, will adversely and irrevocably affect the Commission's deliberative process, i.e., the Commission's review of the Staff's decision on whether enforcement action is appropriate. Staff's

Motion at 5, 7. Even if the Staff's position is correct as it applies to the opinions and conclusions of the OI Report, the Staff's position is simply wrong with respect to the factual information which the Board has ordered it to release, including the information which GPC has requested. Furthermore, the Board went out of its way to ease the burden on the Staff of producing the factual information. The Board's Order requires the Staff to promptly release to the parties only the "easy-to-separate" factual information, i.e., portions which the Staff can "reasonably determine to be factual, without extensive editing and redacting." LBP-94-06, slip op. at 9. The Staff should have been able to accomplish this task within a few working days. The Staff could and should have immediately produced the factual information which GPC requested. In the case of the 26 Exhibits, no culling is necessary to separate facts from opinions. Those documents are already separate documents -- simply transcripts or records of OI interviews, some of which are several years old.

Aside from the fact that there is no privilege which allows the Staff to withhold factual information, GPC has a substantial need for the 26 Exhibits and similar factual information. In particular, GPC believes that the OI interview records of NRC Staff personnel will demonstrate that, during the relevant time period, NRC personnel who were involved with the investigation of the March 20, 1990 site area emergency at Plant Vogtle had all of the same information which was available to GPC personnel and were not misled by GPC statements. GPC does not possess those OI interview records. Most of those interviews were conducted

within a year-and-a-half of the event in question. The factual information disclosed during those interviews should be more enlightening and probative than the three-and-a-half year old recollections reflected in more recent NRC Staff responses to GPC interrogatories.

B. The Staff's Motion Fails to Meet the Commission's Criteria for a Stay.

Of the four factors to be considered in determining whether to grant a request for a stay pursuant to 10 C.F.R. § 2.788(e),² "the most crucial [factor] is whether irreparable injury will be incurred by the movant absent a stay." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 N.R.C. 219, 258 (1990) quoting Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 N.R.C. 795, 797 (1981).

The Staff's Motion fails to demonstrate how, absent a stay, the Commission will be irreparably injured if the factual information associated with the OI Report is promptly released to the parties pursuant to the Board's March 3, 1994, Order. The Staff refers to the February 4, 1994, "EDO Affidavit"³ in support of its argument. Staff's Motion at 7-8. However, as with the Staff's Motion, the EDO Affidavit contains only vague conclusory

² The four 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.

³ See NRC Brief on Release of OI Report Requested in Licensing Board Order of February 1, 1994, dated February 4, 1994.

assertions that the release of the OI Report or its factual attachments or exhibits will "prejudice consideration of any enforcement action," "would have a deleterious effect on the Commission's deliberative processes," "would compromise the Commission's ability to freely deliberate and consider possible enforcement actions." EDO Affidavit at 2. No particularization is provided which explains how the Commission's deliberative process will be irreparably injured if the factual information is released. Without any specifics, GPC is denied an opportunity to disprove the Staff's assertions. Nonetheless, GPC does not understand how the release of factual statements made by NRC Staff personnel in 1991 could interfere with the Commission's deliberations concerning whether to institute an enforcement action. This Staff position is particularly puzzling when the Staff has virtually completed all of its work on the matter -- the OI investigation is complete, the OI Report has been issued, and a task force of Staff personnel from several offices has completed a review of the OI Report. Because no further OI interviews of GPC or NRC personnel are contemplated, there can be no concern that witnesses will tailor their testimony to fit the newly disclosed information.

The Staff's arguments respecting the other three factors of 10 C.F.R. § 2.788(e) are equally lacking. As stated above, the Staff's position concerning the factual information associated with the OI Report is contrary to law. Therefore, the Staff is

not likely to prevail on the merits.² The Staff argues that it is likely to prevail on the merits because the Board has not conducted an in camera review of the OI Report (Staff's Motion at 8). However, there is no need for the Board to review the report with respect to the release of factual material when there is no factual issue for the Board to determine. The Staff's position is simply that the release of factual information is exempt under the deliberative process exemption. The Staff does not raise a factual issue (e.g., whether the factual information is inextricably intertwined with the privileged communications or whether its release will reveal the agency's decision-making process); it only raises a question of law which can be decided without an in camera review of the OI Report.

The harm to GPC that would result if the Staff's Motion were granted is not insignificant. The events associated with the OI investigation occurred in 1990 and this proceeding commenced in September, 1992. The Board has previously acknowledged the prejudice which has occurred to GPC as a result of the Staff's repeated investigative and procedural delays. See Memorandum and Order (Renewed Motion to Compel Staff Production of Documents), LBP-93-22, November 17, 1993, at 13-15 quoting the affidavit of Mr. W. George Hairston, III, attached to GPC's Response to NRC Staff Motion for a Further Extension of Time to Defer Discovery

² Also, the Staff has not yet appealed the Board's March 3, 1994, Order. If it does not do so, the Staff's Motion appears improper. See 10 C.F.R. § 2.788(a) (allowing the filing of an application for a stay of the effectiveness of a decision pending filing of a petition for review.)

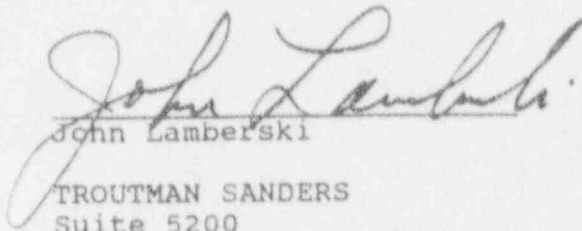
Documents to the Licensee, dated November 8, 1993. GPC believes that the Board correctly observed in its March 3, 1994, Order that the NRC Staff's "delay in not releasing [the factual] information seems to have delayed the litigation of this case unnecessarily." Board's Order at 6.

Finally, GPC submits that the public interest is served by the disclosure of the factual information in accordance with the Board's March 3, 1994, Order so that this proceeding can move forward without further delay. The Staff's argument that the public interest is served by the Staff fulfilling its regulatory obligations (Staff's Motion at 9) rings hollow when (1) the Staff's position concerning the release of factual information is contrary to clear legal precedent, and (2) the Staff unjustifiably ignored the Board's March 3, 1994, Order until the Commission issued a temporary stay on March 18, 1994. Lacking a cogent argument for withholding the factual information associated with the OI Report, the Staff's Motion appears to be designed to delay the time when that information is released to the parties.

IV. CONCLUSION.

For the reasons stated above, GPC respectfully requests that the Commission deny the Staff's Motion with respect to that portion of the Licensing Board's March 3, 1994, Order (LBP-94-06) which required the NRC Staff to promptly release to the parties the factual information associated with the OI Report. In particular, the OI interview records and transcripts should be immediately released to the parties.

Respectfully submitted,


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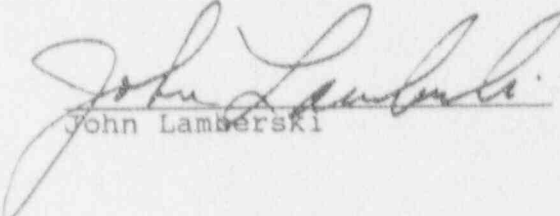
BEFORE THE COMMISSION

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In the Matter of)	Docket Nos. 50-424-OLA-3
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et al.)	Re: License Amendment
)	(Transfer to Southern
(Vogtle Electric Generating)	Nuclear)
Plant, Units 1 and 2))	
)	ASLBP No. 93-671-01-OLA-3

CERTIFICATE OF SERVICE

I hereby certify that copies of "Georgia Power Company's Response to NRC Staff Motion for a Stay of the Licensing Board Order Releasing the Office of Investigations Report" was served by express mail upon the persons listed on the attached service list, this 21st day of March, 1994.


John Lamberski

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of

GEORGIA POWER COMPANY, * Docket Nos. 50-424-OLA-3
at al. * 50-425-OLA-3
*
*
(Vogtle Electric * Re: License Amendment
Generating Plant, * (Transfer to Southern
Units 1 and 2) * Nuclear)
*
* ASLBP No. 93-671-01-OLA-3
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