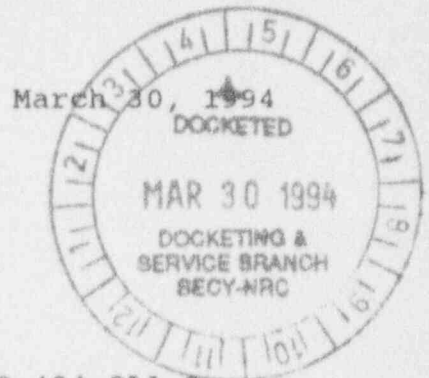


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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

I. INTRODUCTION

Georgia Power Company ("GPC") opposes the NRC Staff Petition for Review of LBP-94-6 and/or Motion for Directed Certification, dated March 24, 1994 ("Staff's Petition"), as it relates to the easy-to-separate factual information associated with the Office of Investigations ("OI") report on OI Case No. 2-90-020R. As discussed in GPC's Response to NRC Staff Motion for a Stay of the Licensing Board Order Releasing the Office of Investigations Report, dated March 21, 1994 ("GPC's Response to Staff's Stay Motion"), the NRC Staff's withholding of this purely factual information is contrary to law and continued delays in its release are prejudicial to GPC. The Staff has provided no explanation how the release of interview records would upset the NRC's deliberative process or inhibit the Commission from reaching an enforcement decision. Obviously it would not. Furthermore, the Staff's Petition should be denied as it relates

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to the factual information because it does not meet either of the two standards supplied by 10 C.F.R. § 2.786(g) for certifying questions or referring rulings to the Commission.

## II. BACKGROUND

On December 17, 1993, the NRC Office of Investigations issued its report on the allegation that GPC made false statements to the NRC regarding diesel generator testing conducted after the March 20, 1990 Site Area Emergency. The NRC Staff has reviewed the report to determine whether enforcement action is appropriate and has forwarded its recommendation to the Commission. Staff's Petition at 5-6.

GPC's Response to Staff's Stay Motion recounts the pertinent history of this proceeding leading to the Board's March 3, 1994 Memorandum and Order, LBP-94-06.<sup>1/</sup> Significantly, while

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<sup>1/</sup> LBP-94-06 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<sup>2/</sup> 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.

<sup>2/</sup>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.

Id. at 9.

Intervenor seeks the release of the entire OI Report and its exhibits or attachments (Tr. 159, 161), GPC seeks and has requested only that the OI records of interviews of NRC Staff personnel and the transcripts of OI's interviews of GPC personnel be released. Tr. 163, 188-89.<sup>2/</sup> GPC believes that if it receives such records and transcripts, which are purely factual, it would have all the information necessary to reach its own conclusions concerning the allegations. Tr. 163, 188-89. Discovery on all matters could then proceed in this case.

On March 14, 1994, the NRC Staff filed a motion for a stay of the Licensing Board Order releasing the OI report. The Commission entered a "housekeeping" stay to preserve the status quo ante while considering the Staff's motion. On March 24, 1994, with the stay motion still under consideration, the NRC Staff filed its Petition For Review of LBP-94-6 and/or Motion for Directed Certification.

### III. DISCUSSION

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

As argued in GPC's Response to Staff's Stay Motion, the NRC Staff's position that release of the OI Report and factual

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<sup>2/</sup> 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. The Licensing Board's February 1, 1994 order broadened the scope of the factual information to include "any or all of the factual attachments or exhibits (not involving the Staff's evaluation or its policy conclusions) to the [OI] Report...." Memorandum and Order (Prehearing Conference Order: Schedule), dated February 1, 1994 (unpublished) (footnote omitted).

information (presumably including the purely factual interview records sought by GPC) will adversely and irrevocably affect the Commission's deliberative process related to possible enforcement actions is without merit with regard to the purely factual information which GPC seeks. The Staff does not demonstrate how release of purely factual information will interfere with the Commission's deliberative process. Instead, it simply lumps together the OI report and factual information without any meaningful analysis relating to the disclosure of facts.

In support of its position, the Staff cites three cases in a footnote for the proposition that "courts have noted that there may be instances where factual information may be withheld." Staff's Petition at 5, n. 8. However, the Staff has made no showing as to why the factual information which the Board has ordered the Staff to release to the parties in this case is entitled to protection from disclosure under the holdings of those cases. A review of the facts in each of those cases shows that they do not support the Staff's position that OI interview records may be withheld.

In the first case, Mead Data Central, Inc. v. Department of Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977), the D.C. Circuit ruled on whether disclosure was required of a "running summary" of the offers and counteroffers made by each side in the Air Force's negotiations with West Publishing Company. The court held:

Predecisional materials are not exempt merely because they are predecisional; they must also be part of the

deliberative process within a government agency. The documents in this case which would reveal the Air Force's internal self evaluation of its contract negotiations, including the discussion of the merits of past efforts, alternatives currently available, and recommendations as to future strategy, fall clearly within this test. Information about the "deliberative" or negotiating process outside an agency, between itself and an outside party, does not.

Id. at 257 (citation omitted). The court then ruled that, absent more compelling reasons which might be brought forth on remand and supported by adequately detailed proof, disclosure of the "running summary" was required.

The OI interview records sought by GPC (notes and transcripts of OI interviews with NRC Staff and GPC personnel) clearly do not fall within the category of records which the Mead Data court held were protected by the deliberative process exemption. Indeed, those records are more like the documents which the Mead Data court ruled must be disclosed because they are not records of internal agency self evaluations but rather are records of statements of facts.

In the second case, Montrose Chemical Corp. v. Train, 491 F.2d 63, (D.C. Cir. 1974), the D.C. Circuit decided the question of whether a summary of facts that had been prepared by the EPA staff for use by the EPA Administrator in formulating his decision and final order was itself a part of the internal, deliberative process which was entitled to protection. The court held that "[t]o probe the summaries of record evidence would be the same as probing the decision-making process itself." Id. at 68. The court went on to state that:



our case here is to be distinguished from a situation in which the only place certain facts are to be found is in the administrative assistants' memoranda. Here all the facts are in the public record. What is not in, and should not be in, the public record is the administrative assistants' evaluation and selection of certain facts from the 9200-page public record. If we confront a case in which some facts are only found in the aide's memorandum, the principles of *Vaughn v. Rosen* and *Cuneo v. Schlesinger* would be applicable, i.e., the Government would bear the burden of putting the record in such shape that all facts are in the public record, separate from analysis which need not be disclosed.

Id. at 70-71 (footnotes omitted).

The Montrose case appears to support GPC's argument that it is entitled to know all the facts which are relevant to the matter at issue in this case. The factual information which GPC seeks is not simply a summary of facts already available to GPC. Among the records encompassed by the Licensing Board's Order is factual information to which GPC currently does not have access.

In the third case, Founding Church of Scientology v. Director, 104 F.R.D. 459 (D.D.C. 1985), the D.C. District Court held that "[t]he rationale for the deliberative process privilege is its supposed avoidance of chilling effects on decision-making. That goal is not furthered and could in fact be hindered by a requirement that the privilege be asserted in all cases by agency heads." 104 F.R.D. at 465, n. 5, quoting U.S. D.O.E. v. Brett, 659 F.2d 154, 156 (TECA 1981), cert. denied, 102 S.Ct. 1992 (1982). The Scientology case addresses the procedures required for asserting the deliberative process privilege and does not provide support for the Staff's position that it is entitled to withhold factual information in the case at bar.

The Staff's Petition focuses on the limited time period of the delay it now seeks, even though the events under investigation occurred almost four years ago, and argues again the elements of the balancing test used by the Licensing Board to deny the NRC Staff's request for continued delay in releasing the OI report and its associated factual materials. The Licensing Board on several occasions, in addition to the Order under review, has addressed the Staff's requests for delay in this proceeding. On January 12, 1993, in a prehearing conference the Staff sought a delay which it anticipated would be "six months." Tr. 91. In November, 1993, the Board recounted the numerous subsequent requests by the Staff to delay discovery, including the various factual representations made by the Staff as to when discovery could proceed in the normal course. Memorandum and Order, dated November 17, 1993, LBP-93-22, at 3-6. Some of the historic Staff representations to the Board and the parties include:

- Completion of investigation and review by the Staff to be completed within four to six months of March 8, 1993;
- Completion of the OI investigation within two months of August 26, 1993;
- Completion of investigation and enforcement review by the Staff and Commission by March 15, 1994. Id.

The Commission should observe that prior to late October, 1993, the factual basis for these delay requests emphasized the pending OI investigation. More recently, with the completion of

the OI investigation on December 17, 1993, and the submission of a recommendation to the Commission, the Staff has founded its arguments on a more slender reed -- application of historic Staff practice and "the spirit" of the Policy Statement. These are factually inadequate and legally insufficient reasons for the continued, prejudicial delays in discovery which began in May, 1993. Id. at 8.

Interestingly, the NRC Staff's balancing analysis fails to address the continuing prejudice to GPC associated with the additional delay it now seeks. Staff's Petition at 9-10. This omission is not surprising given that the Licensing Board has previously found prejudice to GPC as a result of the NRC Staff's delays in producing relevant factual information to GPC. LBP-93-22, supra, at 13-16.

B. The NRC Staff's Petition Does Not Meet the Standards For Interlocutory Review With Regard to Factual Information

When the Commission adopted its current appellate procedures, it preserved the case law standard for interlocutory review developed when the former Atomic Safety and Licensing Appeals Board still existed. See Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-9, 35 N.R.C. 156, 178 (1992). Extensive case law has long held that "interlocutory appellate review of licensing board orders is disfavored and will be undertaken as a discretionary matter only in the most compelling circumstances." Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 N.R.C. 380, 383 (1983) (footnotes omitted); see also, Virginia Electric and Power



Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 N.R.C. 371 (1983); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 N.R.C. 1190 (1977).

In the present appellate structure, where the Commission performs the appellate review function in agency adjudication, the Commission has codified in 10 C.F.R. § 2.786(g) the standard which must be met before interlocutory review or question certification may be granted. Oncology Services Corp., CLI-93-13, 37 N.R.C. 419, 421 (1993). Thus, the Staff's Petition must show that the certified question or referred ruling either:

- (1) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or
- (2) Affects the basic structure of the proceeding in a pervasive or unusual manner.

10 C.F.R. § 2.786(g). The Staff's Petition fails to meet either standard with regard to the factual information GPC seeks.

First, the Staff's Petition fails to articulate, in a clear and convincing fashion,<sup>3/</sup> that the NRC will suffer an immediate and serious irreparable impact by releasing the factual information GPC seeks. The only adverse impact articulated in the Staff's petition is that "premature disclosure of the facts and views reflected in the OI Report could adversely affect the

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<sup>3/</sup> See Palo Verde, supra, 18 N.R.C. at 383 (the NRC's appellate review body "will step into a proceeding still pending below only upon a clear and convincing showing" that the standards in § 2.786(g) for appellate review have been satisfied).

ability of the Commission and its Staff to deliberate concerning whether to institute an enforcement action against the Licensee.<sup>4/</sup> Staff's Petition at 6, emphasis added. GPC is not interested in and does not seek disclosure of "views" reflected in the OI report, or any analysis presented in the OI report. Instead, GPC only seeks purely factual interview records, and the Staff provides no explanation how release of this information would in any way affect the ability of the Commission to deliberate. It is remarkable -- and untenable -- to suggest that, after completion of an investigation, a licensee's knowledge of the facts would interfere with an NRC enforcement

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<sup>4/</sup> The Staff's Petition takes the position that disclosure of OI's factual information is "contrary to long standing agency practice" and cites the NRC Enforcement Manual (May 1990) at § 5.3.4.h and an NRC Staff Memorandum dated May 20, 1992, as support for this assertion. Staff's Petition at 5. However, the Enforcement Manual section referenced above in fact discusses how the NRC Staff generally provides a synopsis of OI's report to the licensee prior to an enforcement conference except in instances where release of the information could interfere with ongoing investigation activities. Moreover, the longer standing practice embodied in the NRC Statement of Policy; Investigations, Inspections, and Adjudicatory Proceedings, 49 Fed. Reg. 36032 (1984), and explained in the Licensing Board's Order, LBP-94-06 (at 5-6), is that purely factual information necessary to the resolution of a matter should be disclosed once an inspection or investigation is completed.

The Staff's reference to a May 20, 1992 Staff Memorandum as support for a "long standing" practice is also questionable. Although the Memorandum states that OI interview transcripts are not to be released before enforcement action is taken, GPC's experience is different. Frequently interview transcripts are provided to witnesses after "field work" is completed by OI. This is an understanding reached prior to the interviews. Indeed, the OI investigator conducting the investigation related to this proceeding reached such an understanding with interviewees prior to their interviews and several months later informed counsel for the interviewees that, due to Office of Enforcement concerns, the transcripts might be withheld.

decision.

The NRC Staff's argument is vague, conclusory, and speculative. It fails to show that the NRC Staff will experience the type of specific, concrete harm necessary to justify the extraordinary nature of the relief sought.<sup>5/</sup> It is inconceivable how release of purely factual information could stifle the deliberative process as claimed in the Staff's Petition. Moreover, the Staff's Petition fails to make a "clear and convincing showing" that it is entitled to the relief it seeks.<sup>6/</sup>

The Staff's Petition does not even address the second standard under which the relief it seeks might be granted. There is no basis for believing that the release of the factual information sought would affect the basic structure of this proceeding in a pervasive or unusual manner. As the Staff's Petition states, "[t]he issue is not whether, but when, to release" the factual information sought by GPC. Staff's Petition at 6, emphasis in original. Given that the entire OI record will eventually be released and available for use in this proceeding,

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<sup>5/</sup> In the absence of a concrete basis for withholding OI's factual information, the NRC Staff is left to invoke the ethereal "spirit of the Policy Statement" as a basis for continuing to withhold the factual information GPC seeks. Staff's Petition at 5.

<sup>6/</sup> The NRC Staff's articulated concerns associated with immediate release of OI's factual information are belied by the fact that the NRC Staff has apparently shared certain factual information with the Intervenor. See Board Notification 94-07, dated March 24, 1994 (Mr. Mosbaugh is able to discuss the content of a 1993 OI interview of Mr. R. P. McDonald even though Mr. Mosbaugh was not present for the interview and even though the NRC Staff insists that its longstanding practice is not to disclose such OI interview transcripts).

release of the factual information now could not affect the "basic structure of the proceeding in a pervasive or unusual manner."<sup>2</sup>

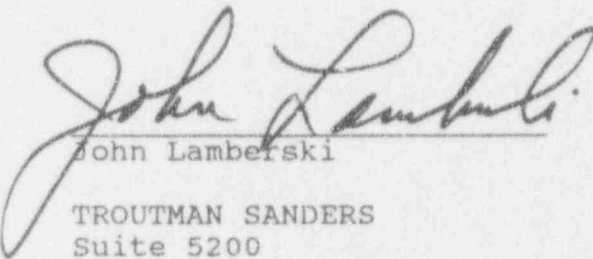
#### IV. CONCLUSION

For the reasons stated above, the Commission should deny the NRC Staff's Petition and order the NRC Staff to comply immediately with the Licensing Board's March 3, 1994 Order (LBP-94-06) as it relates to release of all easy-to-separate factual information.

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<sup>2</sup> The Palo Verde Appeals Board, supra, aptly noted in ruling on an interlocutory review motion that "[u]nderstandably, parties and their counsel are displeased whenever a licensing board enters an interlocutory order that appears to affect their interests adversely and, in their judgment, is plainly wrong to boot. . . . But, to repeat what we have said on so many prior occasions, in the overwhelming majority of instances the party simply must await the licensing board's initial decision before bringing its [appeal] . . . ." 18 N.R.C. at 384.

Respectfully submitted,

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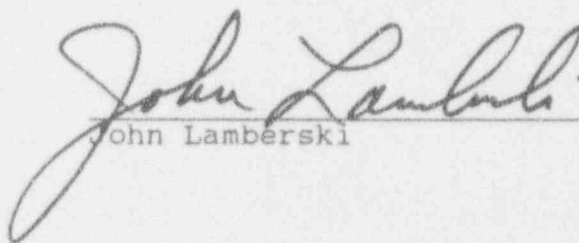
UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
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In the Matter of	)	Docket Nos. 50-424-OLA-3
	)	50-425-OLA-3
GEORGIA POWER COMPANY,	)	
et al.	)	Re: License Amendment
	)	(Transfer to Southern
(Vogtle Electric Generating	)	Nuclear)
Plant, Units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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Georgia Power Company's Response to NRC Staff Petition for Review of LBP-94-6 and/or Motion for Directed Certification" in the above-captioned proceeding was served upon the persons listed on the attached service list by either United States Mail, first class, or as indicated by an asterisk by facsimile this 30th day of March, 1994.

  
John Lamberski

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

In the Matter of

GEORGIA POWER COMPANY, \* Docket Nos. 50-424-OLA-3  
et al. \* 50-425-OLA-3  
\*  
\*  
(Vogtle Electric \* Re: License Amendment  
Generating Plant, \* (Transfer to Southern  
Units 1 and 2) \* Nuclear)  
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