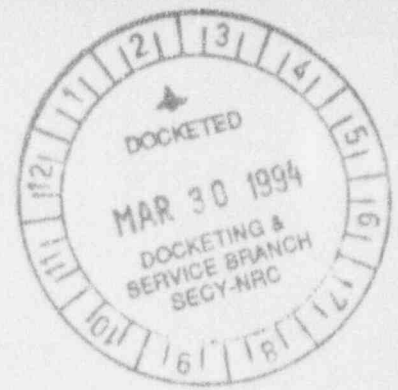


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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION



In the Matter of)
)
GEORGIA POWER COMPANY)
et al.,)
)
(Vogtle Electric Generating)
Plant, Unit 1 and Unit 2))
_____)

Docket Nos. 50-424-OLA-3
50-425-OLA-3

Re: License Amendment
(transfer to Southern Nuclear)

INTERVENOR'S ANSWER TO NRC STAFF'S
PETITION FOR REVIEW OF LBP-94-6
AND/OR MOTION FOR DIRECTED CERTIFICATION

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March 30, 1994

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NUCLEAR REGULATORY COMMISSION

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GEORGIA POWER COMPANY)	Docket Nos. 50-424-OLA-3
<u>et al.</u> ,)	50-425-OLA-3
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INTRODUCTION

On March 25, 1994, the Commission issued an Order requiring the parties to file briefs by March 30, 1994, before 4:15 pm. Intervenor, Allen L. Mosbaugh, hereby files his response and requests that the Commission deny NRC Staff's petition for review of LBP-94-6 and/or motion for directed certification.

ARGUMENT

I.

COMMISSION POLICY PROSCRIBES
INTERLOCUTORY APPEALS OF LICENSING BOARD DECISIONS

- A. The Licensing Board ruling will not cause irreparable harm to the NRC

It is generally accepted that "[n]o interlocutory appeal may be taken to the Commission from a ruling of the presiding officer." 10 C.F.R. § 2.730(f); also see Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-906, 28 NRC 615, 618 (1988), and cases there cited. Directed certification can only be granted in the most extraordinary circumstances in order to give effect to Commission policy

respecting such reviews. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), 25 NRC 129, 134; Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), LBP-88-21, 28 NRC 170, 173 (1988) (The review is granted sparingly and may be taken only under the most compelling circumstances.); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3) ALAB-742, 18 NRC 380, 383 & n. 7 (1983).

Generally, interlocutory review is taken only:

where the ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner.

Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).¹ The Staff has not shown that it will be adversely affected by the Licensing Board's order with immediate and serious irreparable impact. The adverse affect the Staff claims will occur from actions the Intervenor or Licensee might take is speculative and conclusory at best. The Staff can offer no concrete evidence of irreparable harm from the Board's order to release the OI Report. Furthermore, the Board ordered that the release of the OI Report be subject to a protective order. In any event, the harm

¹ See also Arizona Public Service Co. (Palo Verde Nuclear Generation Station, Units 2 and 3), ALAB-742, 18 NRC 380, 383-84 (1983) ("interlocutory appellate review of licensing board orders is disfavored and will be undertaken as a discretionary matter only in the most compelling circumstances.")

associated with public scrutiny cannot constitute either a substantial, concrete or cognizable irreparable harm sufficient to justify granting interlocutory review.

B. The Licensing Board's ruling does not affect the basic structure of the proceeding

The Licensing Board's ruling does not affect the basic structure of the proceeding in a pervasive or unusual manner.

The basic structure of an ongoing adjudication is not changed simply because the admission of a contention results from a licensing board ruling that is important or novel, or may conflict with case law, policy, or Commission regulations.

Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129 (1987) (emphasis added).

The Staff asserts that the Board acted contrary to Commission policy by ordering the Staff to release the OI Report. This is simply not so. See Intervenor's response to NRC Staff motion for a stay, p.2-3. However, even if the Commission determines that the Board did act contrary to Commission Policy, the Commission should not grant an interlocutory review of the Licensing Board's decision. A ruling that may conflict with Commission policy does not change the basic structure of an ongoing adjudication and therefore does not warrant granting an interlocutory review.

**II.
GRANTING THE STAFF'S PETITION FOR
REVIEW WOULD BE CONTRARY TO COMMISSION POLICY**

The ALAB observed in Long Island Lighting Company that "any relaxation of the Marble Hill directed certification standard . . . would appear to clash with the purpose behind 10 C.F.R. §

2.714a."² 25 NRC at 135. The ALAB went on to say that

Had it so desired, the Commission could have conferred a broader entitlement to obtain interlocutory review of threshold Licensing Board action on contentions. More particularly, it could have authorized an interlocutory appeal from the acceptance or rejection of **any** contention, whether or not the Licensing Board's ruling affected the grant or denial of the intervention petition. That that alternative was not adopted provides room for a reasonable inference that the Commission was persuaded that, where the grant or denial of intervention is not in issue, absent exceptional circumstances the appellate review of Licensing Board action on the admission of particular contentions should await the rendition of an initial decision.

25 NRC at 136 (emphasis supplied).

Accordingly, the Staff's petition for review should be denied because it is not covered by the exception in § 2.714a and it does not meet the requirements set out in Marble Hill.

III.

IT IS IN THE LICENSING BOARD'S DISCRETION NOT TO REQUEST IN CAMERA PRESENTATION OF THE OI REPORT

In Finlay Testing Laboratories, Inc., LBP-88-1A, 27 NRC 19, 21 (1988), the Staff requested a stay of the Licensing Board proceedings while the OI investigation was ongoing because it had reached a point where the Staff and OI considered referral of the matter to the Department of Justice (DOJ). The Staff's justification for the delay was that discovery of witness statements, obtained by OI, would reveal to potential targets of

² 10 C.F.R. § 2.714a provides the only exception to the proscription against interlocutory appeals. Under this section, a party may appeal from the acceptance or rejection of contention(s) only if the acceptance or rejection or such resulted in a petition for intervention being denied. 25 NRC 129, 135-36.

the criminal investigation significant information about the investigation. 27 NRC at 23. Moreover, other than telling the Board that criminal discovery procedures are more restricted than those of civil discovery, the Staff offered no justification for withholding discovery from Licensee. Id. In the Staff's motion it stated that it was not prepared to state on the public record, even under a protective order, matters that the Licensing Board may consider necessary to rule on the motion. 27 NRC at 26. The Staff was prepared, however, to make an in camera, ex parte presentation to the Board under the provision of the Commissions Statement of Policy; Investigations, Inspection, and Adjudicatory Proceedings. 49 Fed. Reg. 36,032. Id. The Board denied the Staff's motion for a stay and in doing so declined in camera review. The Board noted that a presentation such as the one offered by the Staff would:

serve no useful purpose...It could not be part of the adjudicatory record upon which we could base a decision to grant or deny Staff's motion for a stay of the proceeding. Nor, in our view, would the additional details hinted at by the Staff tilt the balancing of the equities which weighs so heavily in favor of Licensee and against granting the Staff's motion to prevent this proceeding from going to hearing without further delay.

27 NRC at 26-27.

It is the Staff's contention that the Board erred in ordering the release of the OI Report because it did not engage in an in camera inspection of the OI Report. The case law and regulations are clear that the Board has the sole discretion to determine whether or not it will grant a request for in camera

inspection. See 10 C.F.R. § 2.744(c). The Board acted properly when it ordered the release of the OI Report without requesting in camera presentation by NRC Staff. Accordingly, the Staff's petition should be denied.

IV.

THE COMMISSION SHOULD NOT GRANT AN OPEN ENDED STAY

The four-prong balancing test in Baker v. Wingo 407 U.S. 514 (1972), has been applied by the Licensing Board in determining that an open ended stay was warranted. 27 NRC 19, 23. The four factors are: 1) length of delay; 2) reasons for delay; 3) Licensee's assertion of its rights; and 4) prejudice to the Licensee. NRC Staff cannot prevail under this standard inasmuch as factors way in favor of releasing the OI Report and because Intervenor would be unduly prejudiced by the withholding of the report.

A. Length of Delay

The Staff asserts that the "length of the delay during the Commission's deliberations is not likely to be long." Staff's petition at p. 8. However, the Staff fails to give any definite time period and fails to take into account the extraordinary delay already incurred during the extremely lengthy investigation and review of the investigative report prior to NRC-OI's issuance of its final report. Indeed, Intervenor raised the concerns to the NRC as a confidential allegor almost four years ago and has done everything in his power to accommodate and assist NRC-OI's investigation of the allegations.

Given the extremely serious nature of the allegations and NRC Staff's cautious nature in passing judgment against a licensee, the amount of time before final enforcement action may be accomplished could reach additional months or years. Hence, a delay of the release of the OI Report should not be granted.

B. Reasons for Delay

NRC Staff argues that release of the OI Report and supporting documentation would allow the parties to inquire into the agency's review process before NRC Staff has taken a position on appropriate enforcement action. See Staff's petition p. 6. This argument is specious inasmuch as the final OI Report will eventually be released to the public. To the extent this document can possibly expose the agency's review process, this exposure will eventually be public anyway. The documents the Board has ordered release only concern factual information. NRC Staff's position is simply unreasonable and speculative in nature and in no way justifies withholding of factual information. A delay should not be granted on NRC Staff's supposition as to what Intervenor or the Licensee can glean from purely factual information.

C. Intervenor's Assertion of Its Rights

In this proceeding, Intervenor has asserted his right to discovery and has actively done so. The fact that Mr. Mosbaugh is the original alleger of allegations does not mean he has access to a significant amount of the material relied on by NRC-OI. To the contrary, only NRC and counsel to the Licensee were

allowed to attend the interviews of Licensee personnel. This actually places Intervenor in the worst position of all the parties for two reasons. First, without objection from NRC Staff,³ all of the Mosbaugh tape recordings were released to the Licensee.⁴ Second, GPC's counsel were allowed to attend most, if not all, of interviews of GPC personnel and, as such, it is only the Intervenor who is completely in the dark as to what occurred during the interview process.

D. Prejudice to the Intervenor

The open-ended delay of the release of the OI Report is currently hampering Intervenor's preparation of his case. At this moment he is being forced to expend resources on litigating other allegations concerning the illegal transfer of control of GPC's operation of its nuclear plants to Southern Nuclear. As Intervenor's counsel advised the ASLB, based on the factual information contained in the OI report, Intervenor could decided to forego litigating this issue to conserve resources. Unless

³ Intervenor does not see the logic in, on the one hand, NRC Staff's agreeing to release all of the tape recordings to the Licensee, while on the other denying the interview statements and other factual information which forms the basis for the OI conclusions. Indeed, the Commission should consider NRC Staff's release of the tape recordings to constitute a complete waiver to NRC Staff's latent assertion that factual material contained in the OI report should be withheld until it makes a final determination on enforcement action.

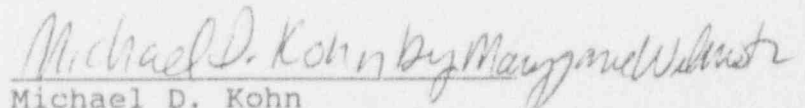
⁴ Pursuant to a protective order filed on behalf of NRC-OI during the course of a Section 210 proceeding, Mr. Mosbaugh was ordered to turn all of his original tapes over to NRC-OI in September of 1990. Mr. Mosbaugh's counsel did not review these tapes and only had access to them at the same time as GPC's counsel obtained its access.

the Intervenor is given access to the witness interviews, depositions and other factual evidence conducted and collected by OI, he cannot adequately prepare his case and cannot adequately make tactical decisions as to how to expend his limited resources. More importantly, Georgia Power Company was able to attend most, if not all, of these interviews and depositions and was given all of Mr. Mosbaugh's allegations and supporting material during the course of discovery in the instant matter. Accordingly, it is the Intervenor who suffers the greatest harm by NRC Staff's withholding of the OI Report.

CONCLUSION

For the above stated reasons, the reasons stated in Intervenor's Brief Concerning the Release of NRC Office of Investigations Report, No. 2-90-020R, and in Intervenor's Response to NRC Staff Motion for a Stay of the Licensing Board Order Releasing the Office of Investigations Report, Intervenor respectfully requests the Commission to deny the NRC Staff's Petition for review of LBP-94-6 and/or motion for directed certification.

Respectfully submitted,



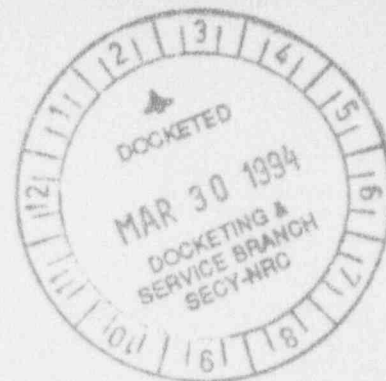
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Docket Nos. 50-424-OLA-3
50-425-OLA-3

Re: License Amendment
(transfer to Southern Nuclear)

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 1994 Intervenor's Answer to NRC Staff's Petition For Review Of LBP-94-6 And/Or Motion For Directed Certification was served by first class mail upon the following (additional service by facsimile designated by "*"):

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Washington, D.C. 20555

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James H. Carpenter
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