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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

COMMISSIONERS:

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Ivan Selin, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gail de Planque

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of the)
)
GEORGIA POWER COMPANY)
)
(Vogtle Electric Generating)
Plant, Units 1 & 2)
_____)

SERVED APR - 7 1994

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

MEMORANDUM AND ORDER

CLI-94-05

I. Introduction

In this decision the Commission decides the controversy among the parties over the disclosure of an investigation report prepared by the Nuclear Regulatory Commission (NRC) Office of Investigations (OI). The parties do not dispute that the OI report is relevant to the matters at issue in this license transfer proceeding. However, the NRC staff has resisted disclosure of the entire report, including the underlying factual information, pending the outcome of the agency's deliberations on possible enforcement action to be taken as a consequence of the investigative results. In LBP-94-6, 39 NRC ____ (1994), the Atomic Safety and Licensing Board denied the staff's request to delay disclosure and instead ordered prompt release of the easy-to-separate factual information in the report and release of the remainder of the report under a protective order.

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This controversy is before the Commission on the "NRC Staff Motion for a Stay of the Licensing Board Order Releasing the Office of Investigations Report," filed on March 14, 1994, and the staff's subsequent "Petition for Review of LBP-94-6 and/or Motion for Directed Certification," which was filed on March 24, 1994. On March 18 1994, the Commission sua sponte entered a temporary stay of the Licensing Board's order. In Orders dated March 16 and 25 respectively, the Secretary of the Commission established a schedule for filing answers to the staff's stay motion and to the staff's petition for review.¹ We have received answers to both staff filings from the licensee, Georgia Power Company (GPC), and the intervenor, Allen L. Mosbaugh. Both parties oppose the staff's position with respect to the withholding of factual material appended to the OI report. In a March 15 motion, Mr. Mosbaugh has also moved to strike the staff's stay motion.

Upon consideration of the parties' filings and the record of this proceeding, the Commission hereby grants the staff's petition for review and, for the reasons stated in this order, the Commission affirms in part and reverses in part the Licensing Board's order in LBP-94-6. Because the Commission is rendering a decision on the merits of the controversy, we need not rule on the staff's stay motion and we dismiss it as moot. We also

¹ In order to expedite our resolution of this controversy, the parties were permitted in their answers to the petition for review to provide arguments on both the question of whether review of LBP-94-6 should be granted and the question of whether LBP-94-6 should be sustained on its merits.

dismiss Mr. Mosbaugh's motion to strike the staff's motion for a stay. As a consequence of these rulings we are ordering the staff to release the exhibits to the OI report within the time specified in section VII of this order, and to release the OI report itself at the time of issuance of any enforcement action. The only information to be withheld, if any, is privacy information or the identity of any confidential sources.

II. Preliminary Procedural Matters

A. *The Staff's Petition for Review*

Although the Licensing Board's order is interlocutory by nature, we have permitted limited exceptions to the general proscription against interlocutory appeals in section 2.730(f) if a party can demonstrate that review is appropriate under one of the criteria in 10 C.F.R. § 2.786(g)(1)-(2). See Oncology Services Corp., CLI-93-13, 37 NRC 419, 420-21 (1993). The staff has shown that review of LBP-94-6 is warranted under the first criterion in section 2.786(g).

At the heart of the staff's objection to the Licensing Board's order to release the OI report is the staff's concern that premature release will adversely affect the agency's ongoing deliberation concerning possible enforcement action. Because the adverse impact of that release would occur now, the alleged harm is immediate. The impact of the order to release a report that would otherwise be held in confidence is irreparable and could not be alleviated through future review of a final decision of

the Licensing Board. Unlike most discovery orders, the instant order must be reviewed now or not at all.

B. Staff's Motion for Stay and Mr. Mosbaugh's Motion to Strike

The Commission is dismissing the staff's March 14 motion for a stay as moot. A stay motion under section 2.788 is intended as a means of obtaining interim relief pending a final determination of a petition for review. Because we are prepared to resolve the merits of the controversy over the release of the OI report and the Licensing Board's order in LBP-94-6, a decision on the staff's motion for a stay is unnecessary. In view of our dismissal of the staff's stay motion, Mr. Mosbaugh's March 15 motion to strike the staff's motion may also be dismissed.

One last comment is warranted about the staff's stay motion. Although that motion was timely under our rules of practice, the staff waited 10 days after service of the Licensing Board's order to file its motion with the Commission. During this time the staff was under an obligation pursuant to the Licensing Board's order to begin releasing factual material contained in or appended to the OI report. Under these circumstances, and in the absence of any delay imposed by the Licensing Board with respect to the effectiveness of its order, the staff should have initiated more promptly its request for a stay of the Licensing Board's order, if only to seek an emergency temporary stay under section 2.788(f) to preserve the status quo.

III. Background on the Disclosure Controversy

OI initiated an investigation in late 1990 into allegations that senior officials at the Georgia Power Company (GPC) made material false statements to the NRC about the reliability of the diesel generators at the Vogtle plant. On December 17, 1993, OI completed its investigation and issued a report for further staff evaluation. Although the instant controversy arises out of the staff's motion to defer discovery, dated January 24, 1994, that motion was not the staff's first attempt to prevent access to the fruits of OI's investigation. The Licensing Board granted two earlier staff requests to defer production of certain tapes, transcripts, and other documents because the staff believed their release would interfere with OI's then ongoing investigation.²

On January 24, 1994, the staff moved to defer all discovery against the staff pending its evaluation of the OI report for possible enforcement action and consultation with the Commission on any proposed action.³ In a prehearing conference held January 27, 1994, Mr. Mosbaugh's counsel stressed that he needed to obtain the OI report to properly and expeditiously prepare his

² See LBP-93-22, 38 NRC 189 (1993); Memorandum and Order (Motion to Compel Production of Documents by the Staff), at 6-7 (Aug. 31, 1993) (unpublished). On December 17, 1993, the staff released some tapes and transcripts. See Letter from Charles A. Barth, NRC Staff Counsel, to Licensing Board (Feb. 18, 1994).

³ NRC Staff Motion to Defer Certain Prehearing Activities Until the Staff Has Formulated A Position (Jan. 24, 1994).

case in this proceeding. Counsel asserted that the report would serve as his "road map" to documents and for stipulations.⁴

Although staff counsel indicated at the prehearing conference (Transcript at 169) that the staff was willing to eventually release the entire OI report, the staff maintained that disclosure before an enforcement decision had been reached could adversely affect the ability of the staff and the Commission to deliberate concerning whether to institute an enforcement action against the licensee.⁵ The staff asserted that the OI report is privileged and protected from discovery as a "predecisional" document.⁶ The staff maintained that a delay in release of the report would not prejudice the interests of the other parties and that other discovery activities could proceed.

The intervenor opposed staff's request for a delay in the report's release. Mr. Mosbaugh argued that no deliberative process privilege attaches to the OI report. First, Mr. Mosbaugh emphasized that the privilege does not apply to purely factual materials.⁷ Second, he claimed that release of the document to the public would not cause harm to the agency because the report does not contain "candid" or "personal" remarks, and because the

⁴ Prehearing Conference Transcript at 159 (Jan. 27, 1994).

⁵ NRC Brief On Release of OI Report Requested In Licensing Board Order of February 1, 1994, at 2-3 (Feb. 4, 1994) and attached Affidavit of James M. Taylor, Executive Director for Operations.

⁶ NRC Brief on Release of OI Report, supra, at 2.

⁷ Intervenor's Brief Concerning the Release of NRC Office of Investigations Report, No. 2-90-020R, at 9 (Feb. 4, 1994).

authors of the report expected public dissemination of their remarks and, therefore, would not be affected by early disclosure of the report.⁸

GPC supported the staff's position, but only insofar as it understood the staff to be seeking protection of the opinions, conclusions, and recommendations within the OI report.⁹ To this extent, GPC conceded that the staff's claim of privilege to withhold the report as a predecisional, deliberative document appeared valid, and GPC did not believe that Mr. Mosbaugh had demonstrated a sufficient interest in obtaining the OI report prior to an NRC decision on enforcement action.¹⁰ GPC suggested that the Licensing Board could release the OI report to the parties under a protective order that would restrict public access until the NRC's enforcement decision had been made.¹¹

In LBP-94-6, the Licensing Board found that no privilege protected factual information in the OI report if such information was "not inextricably intertwined with privileged communications." LBP-94-6, slip op. at 6. As to the evaluative portions of the report, the Board reasoned that because OI's opinions ultimately would be released in this proceeding,

⁸ Id. at 11.

⁹ See GPC's Brief Concerning NRC Staff Release of Certain Investigatory Material, at 5 (Feb. 4, 1994). GPC assumed that the staff was about to release transcripts and other factual material gathered or reviewed by OI.

¹⁰ See id. at 5-8.

¹¹ Id. at 9.

disclosure of OI's evaluations under protective order would have "no additional detrimental impact on discussion in the agency." Id. at 7.

The Licensing Board weighed the interests of the parties, and concluded that the intervenor and GPC would suffer greater harm from a delay in disclosure of the OI report than staff would suffer in its deliberations if the report were promptly released. Id. at 8. Although the Board doubted the applicability of the deliberative process privilege to the OI report, the Board granted staff until April 4, 1994 to release the non-factual portions of the OI report, and also ordered that this disclosure be subject to protective order. Id. at 7.

IV. The Parties' Arguments Before the Commission

In its petition for review, the staff claims that the Licensing Board overvalued GPC and the intervenor's interests in discovery. Petition for Review at 8-10. The staff asserts that the agency's interest in discharging its enforcement obligations "without the distractions or confusion caused by the premature release of preliminary agency enforcement materials" outweighs the parties' need for disclosure of the report. Id. at 7-8. The staff also argues that the Board's decision is contrary to a longstanding agency practice, reflected in the staff's Enforcement Manual (section 5.3.4.h), of only releasing investigative material after enforcement action has been taken, and to the "spirit" of the Commission's Statement of Policy on

Investigations, Inspections, and Adjudicatory Proceedings, 49 Fed. Reg. 36,032 (Sept. 13, 1984). See Petition for Review at 5.

Both GPC and Mr. Mosbaugh oppose the staff's position, particularly with regard to the factual material gathered by OI. GPC argues that the staff's withholding of the purely factual information in the OI report is contrary to law and that continued delay in releasing this material is prejudicial to GPC's interests.¹² GPC seeks only the factual material -- i.e., OI records of interviews of NRC staff personnel and the transcripts of OI's interviews of GPC personnel. The intervenor opposes a further delay in release of the OI materials and also emphasizes a particular need for the interviews, depositions, and other factual material collected by OI.¹³

V. Discovery Rules

The rule governing the production of NRC documents in formal administrative proceedings is set forth in 10 C.F.R. § 2.744. Under this rule, NRC documents must be produced if they are relevant to a proceeding and not exempt from production under the listed exemptions found under 10 C.F.R. § 2.790(a). Even if a document is exempt from disclosure pursuant to section 2.790(a), the document must still be released if it is "necessary to a

¹² GPC's Response to NRC Staff Petition for Review of LBP-94-6 and/or Motion for Directed Certification, at 3-6 (Mar. 30, 1994).

¹³ Intervenor's Answer to NRC Staff's Petition for Review of LBP-94-6 and/or Motion for Directed Certification, at 9 (March 30, 1994).

proper decision in the proceeding" and "not reasonably obtainable from another source." 10 C.F.R. § 2.744(d).

In this case the NRC staff relies on the exemption provided under 10 C.F.R. § 2.790(a)(5) for "[i]nteragency or intraagency memorandums or letters which would not be available by law to a party other than an agency in litigation with the Commission." This exemption is similar to Exemption 5 under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b). FOIA's Exemption 5 shields from disclosure those documents normally privileged in civil discovery, including documents protected by the common law predecisional or deliberative process privilege. Jordan v. Department of Justice, 591 F.2d 753, 772 (D.C. Cir. 1978); see NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-53 (1975); EPA v. Mink, 410 U.S. 73, 85-90 (1973). The deliberative process privilege may be invoked in NRC proceedings. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984).

The deliberative process privilege is unique to the government and protects inter- and intra-agency communications "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Sears, 421 U.S. at 150 (quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd, 384 F.2d 979 (D.C. Cir.)), cert. denied, 389 U.S. 952 (1967). At least three purposes for the privilege exist:

First, [the privilege] protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon. And third, it protects the integrity of the decision-making process itself by confirming that "officials would be judged by what they decided[,] not for matters they considered before making up their minds."

Jordan v. Department of Justice, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc) (citation omitted).

The privilege applies only to information that is (1) "predecisional" and (2) "deliberative." Petroleum Information Corp. v. Department of Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992). A document is predecisional if it was prepared before the adoption of an agency decision and specifically prepared to assist the decisionmaker in arriving at his or her decision. See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975); Hopkins v. Department of Housing & Urban Development, 929 F.2d 81, 84 (2d Cir. 1991). For example, in Grumman Aircraft Eng'g, Regional Boards conducted an investigation, and made analytical findings and recommendations in a report presented to a Renegotiation Board, which used the report in its deliberations, but was not bound by the report's conclusions or analysis. The Supreme Court found the Regional Board reports, which had no operative legal effect by themselves but were prepared to assist the Renegotiation Board's decision, "precisely the kind of predecisional deliberative advice and recommendations contemplated by Exemption 5." Grumman Aircraft

Eng'g, 421 U.S. at 184-87. See also Hopkins, 929 F.2d at 85 (HUD inspection reports were predecisional because inspectors themselves lacked authority to take final agency action).

Communications are deliberative if they reflect a consultative process. Protected documents can include analysis, evaluations, recommendations, proposals or suggestions reflecting the opinions of the writer rather than the final policy of the agency. See National Wildlife Federation v. United States Forest Service, 861 F.2d 1114, 1118-19 (9th Cir. 1988). Deliberative documents "relate[] to the process by which policies are formulated." Hopkins, 929 F.2d at 84. However, a document need not contain a specific recommendation on agency policy to qualify as deliberative. National Wildlife Federation, 861 F.2d at 1118. A document providing "opinions or recommendations regarding facts" may also be exempt under the privilege. See id.

Factual material that does not reveal the deliberative process is not shielded by the privilege. Norwood v. F.A.A., 993 F.2d 570, 577 (6th Cir. 1993) (citing EPA v. Mink, 410 U.S. at 91 (1973)); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 867 (D.C. Cir. 1980). However, if facts are "inextricably intertwined" with the opinion portion, or otherwise would reveal the deliberative process of the agency, the facts may be exempt from disclosure. See Hopkins, 929 F.2d at 85; Norwood, 993 F.2d at 577.

In a litigation context, the deliberative process privilege is a qualified, not absolute, privilege. The government's

interest in confidentiality is balanced against the litigant's need for the information. See Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 404-05 (D.C. Cir. 1984); Carl Zeiss Stiftung, 40 F.R.D. at 327; Shoreham, 19 NRC at 1341. The government agency -- here the NRC staff -- bears the initial burden of showing that the privilege should be invoked. See Coastal States, 617 F.2d at 868. Once the applicability of the privilege has been established, the litigant seeking the information must demonstrate an overriding need for the material. Shoreham, 19 NRC at 1341.

VI. Analysis

The deliberative process privilege applies to the OI report.¹⁴ The staff has made a sufficient showing that the OI report is both a predecisional and deliberative document. As to its predecisional nature, the report is a step in the process leading to an agency decision on enforcement action. Based upon the report, the NRC will determine, in part, whether to take enforcement action. However, the report's conclusions are neither precedential nor binding upon the NRC staff or the Commission. We are thus satisfied that this document is predecisional. See generally Grumman Aircraft Eng'g, 421 U.S.

¹⁴ Because the staff provided the Commission a copy of the OI report with its enforcement recommendations on March 22, we have been able to review the report in camera for the purpose of confirming whether it contains privileged material. See 10 C.F.R. § 2.744(c). Although we have been provided a listing of the exhibits to the OI report, we have not been provided the exhibits themselves; thus, we have not examined them in rendering this decision.

168 (1975) (reports containing investigation results, analysis, and findings, and which were prepared to assist an agency decisionmaker in arriving at a final agency decision were exempt from disclosure). The OI report is also a deliberative document. The report contains OI's evaluative and subjective conclusions on the evidence accumulated during the investigations. For example, sprinkled throughout the report are investigators' "notes," providing evaluations of the reliability and significance of testimony. These subjective evaluations constitute a significant part of the deliberations that will lead to an agency enforcement decision.

Public scrutiny properly focuses upon the agency's enforcement action and the evidence which forms the basis for the action. It strikes the Commission as inappropriate to permit scrutiny of the evaluative statements of OI investigators, even if limited to the other parties, before the Commission itself has had the opportunity to deliberate on any potential enforcement action. As staff has asserted, the investigators' conclusions may or may not be adopted as a basis for any proposed enforcement action. Ultimately, deliberations within the agency may be harmed by the piecemeal disclosure of evaluative conclusions of agency officials prior to an agency decision.

Protected communications include those "which would inaccurately reflect or prematurely disclose the views of the agency," suggesting as the agency's position that which as yet is merely opinion. Coastal States, 617 F.2d at 866. In the long

run, the "efficiency of [g]overnment would be greatly hampered if ... [g]overnment agencies were prematurely forced to 'operate in a fishbowl.'" Petroleum Information, 976 F.2d at 1434 (quoting S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)). Moreover, the Commission does not consider it appropriate to provide GPC, the target of the investigation and a potential target of any enforcement action, a copy of OI's opinions and evaluations before the Commission has had an opportunity to reach an enforcement decision.¹⁵ Accordingly, we find that staff sufficiently has demonstrated that the deliberative process privilege is applicable to the opinion and analyses portions of the OI report.

However, we reject the staff's argument to the extent that staff intends to assert that the entire OI report -- including purely factual exhibits -- may be withheld under the deliberative process privilege. Under the particular facts present here, there is no basis for withholding release of this factual material. The deliberative process privilege shields predecisional opinion, not purely factual information that does not reveal the substance of the predecisional opinion. Mink, 410 U.S. at 89; Norwood, 993 F.2d at 577. The staff provides us with no reason to believe that the factual exhibits to the report are intertwined with OI's analyses. Based on the descriptive listing

¹⁵ Indeed, GPC would obtain an advantage it ordinarily would not receive by being permitted access to the report before it is available to the general public if the Licensing Board's ordered approach were followed.

of exhibits to the OI report, it appears that none of the exhibits can be withheld under a "predecisional" or "deliberative process" theory.

It also appears that the OI report itself (excluding exhibits) is not purely opinion material. The staff has argued, however, that even facts contained in the OI report itself should be privileged because they reflect the investigator's selection of what constitutes significant evidence and, thus, reveal aspects of the agency's deliberative process. Petition for Review at 5 n.8. As staff notes, factual summaries of evidence prepared to assist an administrator in the resolution of a complex question may reveal deliberative analysis and, consequently, may be within the scope of the exemption. See Montrose Chemical Corp. v. Train, 491 F.2d 63, 68 (D.C. Cir. 1974).

In other circumstances, it might be appropriate to order a further demonstration by the staff of the basis for its assertion that the factual descriptions in the OI report should be withheld and to probe whether the report could be culled for release of any portions that do not reveal predecisional opinions and evaluations. However, as this case now stands, the Commission's decision on enforcement action is imminent. Because the staff does not seek protection of the report after an enforcement action is issued, we expect that the parties will obtain the entire OI report very shortly. In light of the imminent release of the OI report, and in the interest of avoiding further delay,

the Commission does not consider a further in camera review or further redaction of the report to be necessary.

Although the deliberative process privilege under section 2.790(a)(5) does not protect factual materials that do not reveal any evaluation or analysis, a proper claim under section 2.790(a)(7)(i) would provide a basis for withholding the factual material compiled during the investigation. This privilege applies to those documents compiled in investigations and inspections whose production "[c]ould reasonably be expected to interfere with enforcement proceedings." 10 C.F.R. § 2.790(a)(7)(i). The privilege corresponds to Exemption 7(A) under FOIA, 5 U.S.C. § 552(b)(7)(A), which protects investigatory files, including factual materials, from disclosure in order to prevent harm to either ongoing or contemplated investigations, or to prospective enforcement actions. See generally NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978). For example, this privilege protects against the premature disclosure of information that could compromise investigative leads, result in harassment of witnesses, lead the target of an investigation to alter testimony or evidence, or "tip the hand" of the government's case.¹⁶ Where the requisite harm to an

¹⁶ See, e.g., Alyeska Pipeline Serv. Co. v. EPA, 856 F.2d 309, 311-14 (D.C. Cir. 1988); Willard v. IRS, 776 F.2d 100, 103 (4th Cir. 1985); Coastal States, 617 F.2d at 870. Principles supporting protection of investigative material are reflected in the Statement of Policy on Investigations, Inspections and Adjudicatory Proceedings, supra, and in rules specifically applicable to certain enforcement orders. 10 C.F.R. § 2.202(c)(2)(ii); Revisions to Procedures to Issue Orders: Challenges

(continued...)

investigation or the enforcement process is shown, this privilege shields even purely factual material.

The staff does not rely on the privilege in section 2.790(a)(7)(i) as a basis for withholding the report. Although this "investigatory" privilege may be invoked at any time prior to completion of enforcement action, we understand staff to argue only that premature release of the factual exhibits to the OI report would harm the agency's deliberative process, not that either the integrity of an NRC investigation or the NRC's ability to prosecute an enforcement action will be compromised by the early disclosure. Although in other circumstances the Commission itself may see an enforcement-related need to invoke the privilege, the Commission is not exercising its discretion under the particular facts of this case.¹⁷ Accordingly, we direct the staff to make available to the intervenor and GPC the report's purely factual exhibits. We will permit a brief period of time prior to release for the staff to review the exhibits to ensure

¹⁶(...continued)

to Orders That Are Made Immediately Effective, 57 Fed. Reg. 20,194, 20,197 (May 12, 1992). See also Oncology Services Corp., CLI-93-17, 38 NRC 44, 56 (1993) (delay in proceeding to protect against premature release of investigative information).

¹⁷ Not only may we invoke the privilege to protect our own investigatory and enforcement processes, but we may also apply the privilege to prevent premature disclosure of information related to a matter that has been referred or is being evaluated for referral to the United States Department of Justice for possible criminal prosecution. In this particular case, we understand that the Department of Justice has already declined prosecution.

that personal privacy information or the identity of confidential sources, if any, has been redacted.

Although we find the deliberative process privilege applicable to the opinion portions of the OI report, we still must balance the interests to be protected against the parties' asserted need for these portions of the report. In balancing the interests at issue, the Licensing Board may have overlooked the interests of the Commission in maintaining the confidentiality of deliberative materials. The premature release of deliberative agency communications, which may or may not be adopted by the Commission, particularly before the agency has reached a final enforcement decision, poses the risks of harm that the deliberative process privilege is intended to prevent. The privilege is designed to foster the quality of the decision-making process.

In contrast, neither Mr. Mosbaugh nor GPC has shown an overriding interest in disclosure of the protected portions of the OI report. Indeed, GPC has not insisted on access to the report itself at this time. Mr. Mosbaugh has stated that he has particular need of the interviews and depositions conducted by OI.¹⁸ Given that Mr. Mosbaugh will receive the evidence underlying the OI investigation, we do not believe that a delay in the release of the OI report pending the Commission's deliberations on possible enforcement action will cause Mr.

¹⁸ Intervenor's Response to NRC Staff Motion for a Stay of the Licensing Board Order Releasing the Office of Investigations Report, at 4 (Mar. 22, 1994).

Mosbaugh any appreciable detriment. Mr. Mosbaugh's counsel is certainly free to fashion his own "road map" to his case from the factual exhibits.

Moreover, immediate disclosure of the entire report is not "necessary to a proper decision in the proceeding." The Commission expects to complete its review of the OI report expeditiously, whereupon staff, which does not intend to protect the report permanently, will release the entire report. Therefore, all parties will have unfettered access to the entire report within a very short period of time. Despite the Licensing Board's emphasis on the need for a "prompt determination of this proceeding," we do not perceive any such need to outweigh the interest in the integrity of the agency's enforcement deliberations. The Board is under no statutory or regulatory deadline to conclude this proceeding. As we understand the Board's most recent scheduling order (issued February 1, 1994), the depositions scheduled for April are focused on the alleged illegal transfer of the license, an issue not covered by the OI report.¹⁹ There is simply no urgency in this proceeding that cannot accommodate an additional minor delay in release of the report.

¹⁹ If necessary, depositions may be reasonably delayed if the parties believe that the OI report will be relevant to this issue. Alternatively, new information in the OI report could be grounds for requesting a follow-up deposition of a particular witness.

VII. Conclusion and Order

As discussed in this decision, the Commission agrees with the Licensing Board that factual exhibits to the OI report should be released to the parties. We disagree with the Licensing Board to the extent that it required disclosure of the portions of the OI report containing OI's evaluations and opinions prior to the conclusion of the agency's deliberations on enforcement action.

Therefore, consistent with the foregoing opinion, the Commission hereby orders:

- (1) The NRC staff's petition for review dated March 24, 1994, is granted;
- (2) The NRC staff's motion for stay of LBP-94-6, dated March 14, 1994, is dismissed;
- (3) The intervenor's motion to strike dated March 15, 1994, is dismissed;
- (4) The Atomic Safety and Licensing Board's order in LBP-94-6 is affirmed in part and reversed in part;
- (5) Within seven days of the date of this order, the NRC staff shall make available to the parties for inspection and copying the documents and materials identified in the list of exhibits to the OI report (Case No. 2-90-020R). Appropriate redactions may be made to protect personal privacy information or the identity of confidential sources;
- (6) At the time of issuance of an enforcement action (or upon a decision to take no enforcement

action) related to the matters within the scope of the investigation, the NRC staff shall make available to the parties for inspection and copying OI's report of investigation (Case No. 2-90-020R). Appropriate redactions may be made to protect personal privacy information or the identity of confidential sources.

It is so ORDERED.



For the Commission²⁰

A handwritten signature in cursive script, appearing to read "John C. Hoyle".

John. C. Hoyle
Assistant Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of April 1994.

²⁰ Commissioner de Planque was not present for the affirmation of this order; if she had been present, she would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of
GEORGIA POWER COMPANY, ET AL.
(Vogtle Electric Generating Plant,
Units 1 and 2)

Docket No.(s) 50-424/425-OLA-3

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMM M&O (CLI-94-5) DTD 4/7/94 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Peter B. Bloch, Chairman
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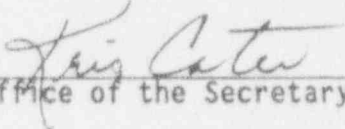
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Docket No.(s)50-424/425-OLA-3
COMM M&O (CLI-94-5) DTD 4/7/94

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Birmingham, AL 35201

Dated at Rockville, Md. this
7 day of April 1994


Office of the Secretary of the Commission