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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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)

ALLEN MOSBAUGH'S OPPOSITION TO GPC'S APPLICATION FOR STAY

On February 18, 1993 the Atomic Safety and Licensing Board ("ASLB") issued a Memorandum and Order ("M&O") granting Petitioner Allen Mosbaugh standing, admitting a reconstituted contention and authorizing Petitioner to commence discovery against Georgia Power Company ("GPC") (and GPC against petitioner). Thereafter, on March 4, 1993 GPC filed with the U.S. Nuclear Regulatory Commission ("Commission") an application for a stay of the Memorandum and Order of the Atomic Safety and Licensing Board ("ASLB").

On March 18, 1993, the Commission issued CLI-93-06. GPC's request for stay was referred to the ASLB for consideration. In accordance with instruction from the Commission, Mr. Mosbaugh hereby files his response to GPC's Stay request.

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INTRODUCTION

The parties are not in disagreement over the applicable criteria this Board must weigh in order to grant a Stay. 10 C.F.R. §2.783(c). The four criteria for a Stay 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.

Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981)

GPC contends that the "most crucial of the four factors" is irreparable injury. GPC Application for Stay p. 3. Consequently, GPC primarily argues that it will suffer irreparable harm if a Stay is not granted. The NRC Staff (hereafter known as "Staff"), however, claims that they do "not have sufficient information" on this issue. NRC Staff Brief p.6. Additionally, the Staff correctly argues that GPC cannot meet the second factor (likelihood of success on the merits).

However, the Staff supports granting a Stay on the basis of the fourth factor: the "public interest" issue. The Staff argues that "special circumstances" exist in this proceeding justifying a Stay under the fourth factor: "The ongoing investigation warrants holding the proceeding in abeyance until

it has been determined whether the submission of allegedly false information to the NRC involved wrongdoing." Staff Brief p. 3.

For reasons set forth below, the ongoing Department of Justice ("DOJ") and NRC Office of Investigation criminal proceeding in this case does not warrant a Stay on either the grounds argued by GPC or Staff.

ARGUMENT

I. The Potential Criminal Liability of GPC for Misconduct in Its Operation of Plant Vogtle Does Not Justify a Stay of This Proceeding

As a general rule of law, it is well settled that a party in a civil matter does not possess a right to Stay discovery in a civil proceeding merely because that party faces criminal indictment. See Federal S & L Insurance Corp. v. Molinar, 889 F.2d 899, 902 (9th Cir. 1989); S.E.C. v. Dresser Indus., 628 F.2d 1368, 1375 (D.C.Cir.), cert. denied, 449 U.S. 993 (1980); United States v. Kordel, 397 U.S. 1, 90 S.Ct. 189, 25 L.Ed.2d (1970).

A review of GPC's moving papers indicates that GPC seeks a Stay of these proceedings on the basis that its employees could be subjected to deposition and interrogatories on areas relevant to an on-going DOJ criminal investigation, and that "[t]his situation has the potential for undermining the Fifth Amendment privilege rights of GPC employees, expanding the rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), exposing the basis of GPC's and its employees' defenses to any criminal prosecution in advance of a trial, or otherwise prejudicing the case." GPC's Application for Stay,

dated March 4, 1993, at p. 4.

As a threshold matter, in deciding the stay issue, the ASLB should consider the extent to which the parties have a right to a Fifth Amendment Privilege. Molinar, supra, 889 F.2d at 902.2 As a corporation, GPC is not entitled to Fifth Amendment protection. See, e.g., U.S. v. Kordel, 397 U.S. 1, 8 & fn 9, 90 S.Ct. 763, 767, 25 L.Ed.2d 1 (1970). Because Fifth Amendment privileges do not attach to corporations, and because no other party to this proceeding currently faces indictment, no party to this process is entitled to a stay of discovery on Fifth Amendment grounds.¹

Additionally, GPC does not have a standing to raise a Fifth Amendment Privilege on behalf of some unknown employee. At best, GPC's assertion that one or more of its employees may seek Fifth Amendment protection is speculative, and it is not only improper, but premature for GPC to hypothetically raise this privilege on behalf of an unknown employee(s) at this time. The issue of privilege is not ripe until such time as a GPC employee comes forward seeking Fifth Amendment protection. GPC is not a law firm and, as such, it may not invoke the Fifth Amendment on

¹ Indeed, until an indictment is handed down, it is premature for the ASLB to even consider GPC's asserted Fifth Amendment concerns of its employees. In this respect, federal courts have determined that where no indictment has issued, a request to stay civil proceedings should be summarily denied. See Unites States v. District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America, et al., 782 F.Supp. 920, 925 (S.D.N.Y. 1992); S.E.C. v. Gilbert (and cases cited therein). Also see S.E.C. v. Dresser Industries, 628 F.2d 1368, 1376 (D.C.Cir.), cert denied, 449 U.S. 993 (1980) (a request for a stay of civil proceedings is "a far weaker one" when "[n]o indictment has been returned" and "no Fifth Amendment privilege is threatened").

behalf of its employees. It is up to the individual employee to do so on his or her own accord.

Indeed, GPC is not in a position to protect any of its employees concerning the operation of Plant Vogtle. If GPC uncovers information indicating that any of its employees engaged in criminal wrongdoing or other misconduct, then GPC is under an affirmative duty to report such criminal wrongdoing to the NRC. See 10 C.F.R. §73.71, App. G (as amplified in NUREG-1304 Reporting of Safeguards Events, Item 2.2.2 ("discovery of a criminal act" including "felonious acts" and "conspiracy" reportable to NRC within one hour of discovery); Regulatory Guide 5.62, Reporting of Safeguards Events, Section 2.2, at Example 2 (safeguard events to be reported within one hour Reportable Events include "felonious act[s]" and "conspiracy"). Simply stated, not only may GPC not invoke the Fifth Amendment on behalf of its employees, GPC must fully disclose any and all information it possesses regarding criminal conduct regardless of the Fifth Amendment rights of the employees. If GPC learns of the potential crime, GPC must disclose the potential crime.

GPC's affirmative duty to disclose to the NRC the potentially illegal or wrongful acts of its managers also impacts on the Staff's public interest agreement. The public interest will be served by swift licensing proceedings in which GPC may be questioned concerning its obligations under 10 C.F.R. §73.71 App. G and its knowledge of potentially criminal activity.

The fact that GPC may want to assert a Fifth Amendment

privilege on behalf of employees raises serious concerns regarding its obligations to the NRC and the public under 10 C.F.R. §73.71, App. G.

II. Protection of the Public's Interest requires simultaneous civil and criminal proceedings.

The underlying allegations forming the basis of this proceeding demonstrates that it is in the public's interest for the instant matter to proceed expeditiously. As a general principle, "the public interest may often require proceeding simultaneously on two fronts, and that it would unduly compromise the public interest to force the government to choose between civil and criminal course of action." Mainelli v. U.S., 611 F.Supp. 606, 615 (D.R.I. 1985) (citing United States v. Kordel, supra, S.E.C. v. Dresser Industries, 628 F.2d 1368 (D.C.Cir. 1989); Arthurs v. Stern, 560 F.2d 477 (1st Cir. 1977); Coalition of Black Leadership v. Cianci, 480 F.Supp 1340 (D.R.I. 1979)). Because the matter at hand directly impacts the current operation of Plant Vogtle (i.e., whether the SONOPCO personnel presently operating Plant Vogtle have criminally violated NRC requirements and are engaging in a criminal conspiracy to cover-up intentional wrongdoing), it is in the public interest to expedite these proceedings.

The Staff raises two concerns on this issue. First, Staff states that this proceeding should be held in "abeyance until it has been determined" whether GPC engaged in "wrongdoing." Staff Brief, p. 3. However, this "determination" is the precise issue before the Board. This Board must adjudicate the licensing

impact of the alleged wrongdoing and whether the alleged wrongdoing should impact on the license transfer to SONOPCO.

Even if the DOJ determines that GPC is not guilty "beyond a reasonable doubt" of criminal activity, the Board still must evaluate GPC's and SONOPCO's conduct. The Board is not compelled to apply a criminal standard of proof to the adjudication of the admitted contention. Indeed, the public interest dictates that GPC and its managers be held to a preponderance of evidence standard in this proceeding.

Staff's main concern appears to be the potential that its "investigative material" not be "prematurely released." This concern, which is well taken by petitioner, can be fully remedied without a full Stay in this proceeding.

III. GPC is not entitled to a Stay because the NRC has not initiated civil litigation in order to enhance a criminal investigation.

The case law relied upon by GPC simply does not support its proposition that Petitioner is not entitled to discovery. The cases relied upon by GPC merely stand for the proposition that good cause for a Stay exists where the defendant can demonstrate special circumstances which provide "specific evidence of agency bad faith or malicious governmental tactics." Dresser, supra, 628 at 1365. Absent this, the courts have uniformly found that the public interest often makes it necessary to promptly proceed with civil cases irrespective of the status of a criminal investigation. Id. The Dresser court notes that a case for a Stay is strongest where there is specific evidence of agency bad

faith or malicious governmental tactics, or else where a party is under indictment. In this instant matter, GPC does not claim that the NRC or DOJ has acted maliciously or in bad faith. Likewise, a Stay is equally not in order because, to date, "[n]o indictment has been returned; no Fifth Amendment privilege is threatened." *Id.*, at p. 1376.

Finally, none of the cases relied upon by GPC concern the necessity for a Stay where the party seeking discovery is not a governmental agency. As such, the case law relied upon by GPC is inapplicable. Moreover, the public interest shifts where the case is brought by a private party because it is in the public's interest for justice to be dispatched with speed.

CONCLUSION

The fact that GPC must face a potentially unpleasant choice does not present a legal justification for the issuance of a Stay. The controlling factor in this case is the public interest. The United States Congress has determined that vigorous public adjudication on matters related to nuclear safety should be encouraged and, with that in mind, enacted section 189(a) of the Atomic Energy Act. It would be contrary to the public interest to stifle public participation on the serious matters before this Court. Additionally, if Petitioner's contention can be proven, swift adjudication of the issue is clearly in the public interest.

Respectfully submitted,

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(SK)

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Dated: March 22, 1993

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NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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50-425-OLA-3Re: License Amendment
(transfer to Southern Nuclear)CERTIFICATE OF SERVICE

I hereby certify that on March 22, 1993, at or before 4:15 p.m., copies of Allen Mosbaugh's Opposition to GPC's Motion for Stay commenced being served upon the following persons, via facsimile:

Office of the Secretary
Attn: Docketing and Service
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judges
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And, as identified on the following page, was served, by first class mail, postage prepaid upon:

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(* Original and two copies)

Office of Commission Appellate
Adjudication
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Washington, D.C. 20555

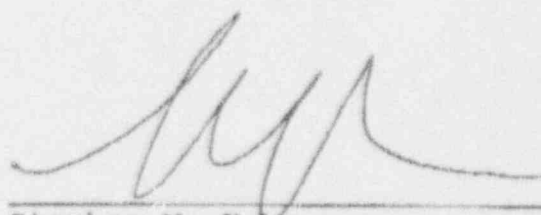
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