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DOCKETED  
October 11, 1994

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Board

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

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  
THE BOARD'S SEPTEMBER 20, 1994 REQUEST

Georgia Power Company ("Georgia Power") hereby provides its response to the Licensing Board's request in its Memorandum and Order (Request for Extension of Time), dated September 20, 1994. That Order asked Georgia Power to respond to the NRC Staff's claim of an absolute privilege concerning what factual information is relied on by the Commission in reaching its determinations. Order at 2.

I. BACKGROUND.

The Board's Memorandum and Order (Staff Responses to Intervenor's First Request for Admissions, Second Set of Interrogatories), LBP-94-26, 40 N.R.C. \_\_ (1994) ruled that:

Intervenor should be provided with any document or portion of a document that has not already been disclosed and that contains segregable factual information that was considered by any person (including Commissioners and their

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staffs) in deciding whether or not to issue the NOV.

LBP-94-26, Slip. Op. at 12, 15. The Board's Order further required that all responses to LBP-94-26 be filed so that they are received on September 22, 1994. Id. at 16.

On September 16, 1994 the NRC Staff filed a Motion for Extension of Time to Respond to Discovery Ordered in LBP-94-26 ("Staff Motion"). The Staff requested, among other things, that the time for it to file an amended response to Intervenor's Second Interrogatories be extended to October 14, 1994. The Staff Motion stated:

[B]y October 14, 1994, the Staff could only identify what factual/opinion documents it provided to the Commission -- not what factual information the Commission considered. Beyond this, there can be no discovery of the Commissioners. See Consumer Powers Co. (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96, 100-01 (1981) (in amending the discovery rules in connection with the Commission staff, the Commission considered whether to allow any exceptions to the reach of a licensing board's discovery subpoena power in exceptional circumstances and chose to exempt themselves).

Staff Motion at 5.

## II. DISCUSSION.

In Midland, ALAB-634, 13 N.R.C. 96, supra, the Appeal Board considered whether senior NRC Staff division director was

required to attend a deposition pursuant to the requirements of 10 C.F.R. § 2.720(h). In holding that there was no exemption from such requirements for a senior Staff division director, the Appeal Board concluded that the Commissioners had only exempted themselves from the requirements of 10 C.F.R. § 2.720(h). 13 N.R.C. at 101. It follows from the Appeal Board's analysis that the Commissioners also exempted themselves from having to respond to written interrogatories since the provisions of 10 C.F.R. § 2.720(h), at subsection (2)(ii), also govern written interrogatories to be answered by NRC personnel.

However, the Commissioners did not exempt themselves from the regulations which govern production of NRC records and documents. 10 C.F.R. § 2.720(h)(3) states that "[r]ecords or documents in the custody of the Commissioners and NRC personnel are available for inspection and copying or photographing pursuant to §§ 2.744 and 2.790."

Unlike the provisions of 10 C.F.R. § 2.720(h), the provisions of 10 C.F.R. § 2.744 do not draw a distinction between discovery against the NRC Commissioners versus other NRC personnel. Under Section 2.744(b), the NRC Executive Director of Operations ("EDO") can object to a request for production of NRC records or documents<sup>1/</sup> on the grounds that (1) it is not

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<sup>1/</sup> The NRC's definition of "NRC records and documents" does not distinguish between documents in the possession of the NRC Staff and those in the possession of the Commissioners. "NRC records and documents" are defined as

any book, paper, map, photograph, brochure, punch card,

relevant, or (2) it is exempt from disclosure under § 2.790 and the disclosure is not necessary to a proper decision in the proceeding or the document or the information therein is reasonably obtainable from another source. 10 C.F.R. § 2.744(b). If the EDO objects to a request for the production of documents, the requesting party may apply to presiding officer to compel production. 10 C.F.R. § 2.744(c). The presiding officer is to order the EDO to produce the requested documents if he determines that they are relevant and their production is not exempt from disclosure under § 2.790 or that, if exempt, their disclosure is necessary to a proper decision in the proceeding, and the document or the information therein is not reasonably obtainable from another source. 10 C.F.R. § 2.744(d).

The Staff apparently takes the position that Intervenor's request for documents which were "considered" by the Commissioners in deciding whether to issue the NOV is a written

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magnetic tape, paper tape, sound recording, pamphlet, slide motion picture, or other documentary material regardless of form or characteristics, made by, in the possession of, or under the control of the NRC pursuant to Federal law or in connection with the transaction of public business as evidence of NRC organization, functions, policies, decisions, procedures, operations, programs or other activities. "NRC records and documents" do not include objects or articles such as structures, furniture, tangible exhibits or models, or vehicles and equipment.

10 C.F.R. § 2.4.

interrogatory governed by the provisions of 10 C.F.R.

§ 2.720(h).<sup>2/</sup> While the NRC Staff does not set forth its reasoning, Georgia Power assumes that it so concludes because an inquiry of each Commissioner would be required to determine whether he or she in fact considered a document in reaching a decision. Under this analysis, Georgia Power concludes the Staff is correct in asserting that Commissioners are exempt from such provisions. See Midland, supra, 13 N.R.C. at 101.

On the other hand, if Intervenor's request for documents "considered" by the Commissioners is treated purely as a request for the production of NRC records and documents in the custody of the Commissioners, then the provisions of 10 C.F.R. § 2.744 apply. In this case, the Staff could not object to the request on the grounds that the Commissioners are exempt from having to respond to the request.<sup>3/</sup>

Therefore, as Georgia Power views it, this issue boils down to whether Intervenor's request is treated as an interrogatory, subject to the provisions of 10 C.F.R. § 2.720(h), or purely as a

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<sup>2/</sup> Apparently, the Staff does not object to the production of documents which the Staff "provided to" the Commissioners to assist them in their deliberations. Staff Motion at 5. Georgia Power interprets the provisions of 10 C.F.R. § 2.744 as applying to the documents which were "provided to" the Commissioners.

<sup>3/</sup> Georgia Power concludes the Staff has abandoned any objection to the production of the documents "considered" by the Commissioners which may be grounded in the deliberative process exemption. In addition to not asserting the objection, the Staff is willing to produce the documents which it "provided to" the Commissioners, which documents presumably envelope the documents which the Commissioners "considered."

request for the production of NRC records and documents, subject only to the provisions of 10 C.F.R. § 2.744. In answering this question, Georgia Power observes that Intervenor styled his request as an "interrogatory." Further, the policy considerations underlying the Commission's decision to exempt the Commissioners from 10 C.F.R. § 2.720(h) suggest that Intervenor's request for documents "considered" by the Commissioners should be treated as an interrogatory subject to the provisions of 10 C.F.R. § 2.720(h).

In promulgating the provisions of 10 C.F.R. § 2.720(h) relative to the attendance and testimony of NRC (then AEC) personnel in adjudicatory proceedings, the Commission stated:

The procedure and criteria established seek to accommodate the public interest in having participation by appropriate AEC personnel in resolving matters in issue in an adjudicatory proceeding with a parallel public interest in maintaining the efficient and expeditious conduct of this and other agency functions.

35 Fed. Reg. 19500 (December 23, 1970). In exempting themselves from the requirements of 10 C.F.R. § 2.720(h), the Commission apparently concluded that the efficient and expeditious conduct of the Commissioners responsibilities outweighed the public interest in having the Commissioners participate in resolving matters at issue in an adjudicatory proceeding. It follows that the Commissioners should be exempt from discovery requests which require the Commissioners themselves to resolve matters in an adjudicatory proceeding.

Finally, because the NRC Staff has agreed to produce the

documents which it "provided to" the Commissioners, Georgia Power believes that Intervenor's request for documents "considered" by the Commissioners becomes purely a matter of having the individual Commissioners identify which of these documents they, in fact, considered in their deliberations.<sup>4/</sup>

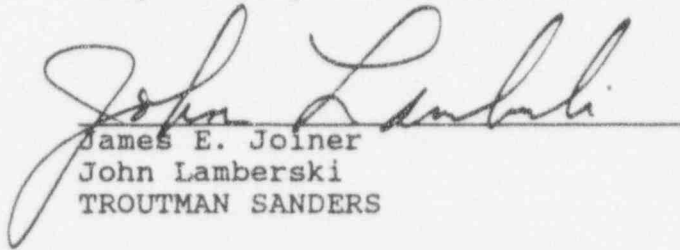
### III. CONCLUSION.

For the foregoing reasons, Georgia Power concludes that the NRC Staff's position is correct and the Commissioners should be exempt, pursuant to the provisions of 10 C.F.R. § 2.720(h), from having to identify which of the documents provided to them by the NRC Staff were "considered" by the Commissioners in reaching a decision to issue the May 9, 1994 Notice of Violation to Georgia Power.

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<sup>4/</sup> Georgia Power would not reach this conclusion if the documents considered by the Commissioners include documents which are not among the documents "provided to" the Commissioners.

Respectfully submitted,

  
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Dated:      October 11, 1994



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John Lamberski

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