

covered by the deliberative process privilege¹. The documents are listed in the Privilege Log attached to the Staff's response to BREDL's Discovery Request, as Attachment C.² The documents include, *inter alia*, draft documents, e-mails, and slides from internal meetings of NRC staff members. These documents are all exempt from disclosure under 10 C.F.R. § 2.790(a)(5), "intraagency memorandums or letters which would not be available by law to a party other than an agency in litigation with the Commission."

DISCUSSION

The deliberative process privilege is reflected in 10 C.F.R. § 2.790(a)(5). *Vogtle*, CLI-94-5, 39 NRC at 197. That privilege may be invoked in NRC proceedings. *Id.* It includes "intraagency communications 'reflecting advisory opinions, recommendations and deliberation comprising part of a process by which governmental decisions and policies are formulated.'" *Id.*, citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). *See also Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984) The privilege applies to documents that are predecisional and deliberative. "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." *Vogtle*, CLI-94-5, 39 NRC at 197 (emphasis in original) (citations omitted). Deliberative communications reflect a consultative process. *Id.* at 198.

Protected documents can include analysis, evaluations, recommendations, proposals, or suggestions reflecting the opinions of the writer rather than the final policy of the agency. Deliberative documents "relate[] to the process by which policies are formulated." However, a document need not contain a specific recommendation on agency policy to qualify as deliberative. A document providing

¹ See BREDL's First Set of Discovery Requests Directed to NRC Staff, April 2, 2004 (BREDL's Discovery Requests).

² See NRC Staff's Response to the Blue Ridge Environmental Defense League's First Set of Discovery Requests to NRC Staff, April 14, 2004.

“opinions or recommendations regarding facts” may also be exempt under the privilege.

Id. (internal citations omitted). The purpose of the privilege is to “encourage frank discussions within the government regarding the formulation of policy and the making of decisions.” *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1164 (1982.) *See also Shoreham*, ALAB-773, 19 NRC at 1346-47. In litigation, the privilege is qualified. The agency’s interest in confidentiality must be balanced against the interest of the litigant in obtaining the information. *Vogtle*, CLI-94-5, 39 NRC at 198; *Shoreham*, ALAB-773, 19 NRC at 1341. The litigant’s need must be “overriding” or involve “special circumstances” in order to defeat a valid claim of this privilege. *Shoreham*, ALAB-773, 19 NRC at 1343. The burden of demonstrating that the privilege is properly invoked rests with the agency. The burden of showing that there is an overriding need for release of the documents rests with the party seeking disclosure. *Id.* at 1341. (Neither the desire to use such documents for impeachment of witnesses or to find weaknesses in the opposing party’s case, nor the ultimate incorporation of deliberative material into a final public document, demonstrates a “compelling need for the material.” *Id.* at 1343-44, 1345-46.) “[I]t is the ultimate institutional findings and determinations by [the decisionmaker], not the predecisional opinions of various members of [the Staff], that are centrally important.” *Id.* at 1346.

In this case, the Staff is invoking the deliberative process privilege for documents that are predecisional, in that they were prepared before issuance of the final agency document and were specifically prepared to assist the Staff decisionmaker in arriving at his decision. They are also deliberative communications, in that they contain “analysis, evaluations, recommendations, proposals, or suggestions” of individual staff members rather than the final decision of the agency. The documents listed in the Privilege Log as being withheld pursuant to the deliberative process privilege are draft documents, predecisional inputs to final safety evaluations, slides and notes

prepared for internal presentations to NRC Staff members and Commissioner Assistants, internal documents prepared by individual Staff members discussing their evaluations, views and/or opinions, and e-mails exchanged during their review. These documents contain the individual analyses, evaluation and opinions of individual staff members. They do not reflect final Staff decisions. They are part of the Staff's deliberative process leading to final Staff decisions and, thus, are exempt from disclosure under the Commission precedent discussed above. As indicated earlier, the Commission has an important interest in protecting its deliberative process since this process is essential to protect the free flow of opinions, information and ideas in decision making. "The Licensing Board [should not overlook] the interests of the Commission in maintaining the confidentiality of deliberative materials." *Vogle*, CLI-94-5, 39 NRC at 201.

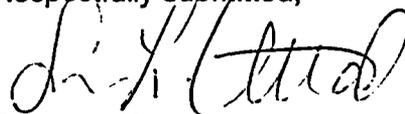
The Staff notes that it is the usual procedure for the party seeking disclosure to file a motion to compel. *See e.g., Shoreham*, ALAB-773, 19 NRC at 1339. Since BREDL has not filed such a motion, the Staff cannot anticipate whether BREDL will seek production of any of the documents in question. Nor can the Staff anticipate and identify justifications for disclosure that may be proffered by BREDL. Therefore, the Staff requests that the Board afford it an opportunity to respond, in writing, to any motion to compel that may be filed by BREDL.

The Staff asserts that the deliberative process privilege may be applied to each separate request, to a category of documents, or to each document within the scope of a request. However, the privilege may properly be invoked by a general objection to the request, accompanied by a designation of each document that is being withheld pursuant to the privilege. The Staff must demonstrate that the deliberative process privilege is applicable to the documents being withheld, and BREDL must demonstrate an overriding need for the withheld documents. The Board's determination regarding the documents may require an *in camera* review.

CONCLUSION

Based upon the foregoing, the Staff's decision to withhold those documents listed in the Privilege Log as being withheld pursuant to the deliberative process privilege is valid and should be upheld.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Susan L. Uttal".

Susan L. Uttal
Counsel for NRC staff

Dated at Rockville, Maryland
this 14th day of April 2004.