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January 7, 2008

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The U.S. Nuclear Regulatory Commission
Attn: Rulemakings & Adjudications Staff
Office of the Secretary
Washington, DC 20555-0001

Dear Commissioners:

Enclosed please find the "Motion to Quash the December 3, 2007 NRC Office of Investigations Subpoena Issued to Daryl M. Shapiro, Esq."; Notices of Appearance for the undersigned and Timothy J. V. Walsh; and a Certificate of Service.

Sincerely,

Jack McKay

cc: Service List

COPY

January 7, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)
	)
SUBPOENA ISSUED TO DARYL M.	)
SHAPIRO, ESQ, OF PILLSBURY	)
WINTHROP SHAW PITTMAN LLP	)
IN NRC INVESTIGATION NO.	)
2-2006-017	)

MOTION TO QUASH THE DECEMBER 3, 2007 NRC OFFICE OF INVESTIGATIONS SUBPOENA ISSUED TO DARYL M. SHAPIRO, ESQ.

Pursuant to 10 C.F.R. § 2.702(f), Nuclear Fuel Services, Inc. ("NFS")[1] and Daryl M. Shapiro, Esq.[2] hereby move to quash the December 3, 2007 Subpoena issued by the Nuclear Regulatory Commission ("NRC" or "the Commission") Office of Investigations ("OI") to NFS outside counsel Daryl M. Shapiro to testify in NRC Investigation No. 2-2006-017.[3] Federal case law and Commission precedent protect against compelled testimony and disclosures that infringe upon the attorney-client and work product privileges. The NRC OI command to Mr. Shapiro to testify in this matter would undoubtedly infringe upon protected attorney-client communications and protected attorney work product. NRC OI has provided no basis to overcome the attorney-client privilege and attorney work product protection at issue here, as well as other criteria that

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[1] NFS is an NRC license holder under 10 C.F.R. Part 70 and is located 1205 Banner Hill Road, Erwin, TN 37650.

[2] Mr. Shapiro is an attorney at law in good standing admitted to practice before the courts of the District of Columbia and various state and federal courts. His principal office is located in the District of Columbia, and he is a resident of the State of Maryland.

[3] The Commission has "consistently treated a motion to quash or modify an NRC Staff or NRC-OI subpoena using the procedures analogous to those used in resolving a motion under" 10 C.F.R. § 2.702(f), formerly codified at 10 C.F.R. § 2.720(f). Henry Allen, Diane Marrone & Susan Settino, CLI-94-8, 39 N.R.C. 336, 346 n.2 (1994), citing Joseph J. Macktal, CLI-89-12, 30 N.R.C. 19, 20 (1989).

must be met under controlling precedent before compelling the testimony of counsel. Consequently, the Commission should quash the subpoena.

I. BACKGROUND

A. NRC OI Investigation No. 2-2006-017

Pillsbury Winthrop Shaw Pittman LLP ("Pillsbury") has served as NFS' outside nuclear counsel for over two decades. Mr. Shapiro is the partner with Pillsbury with primary responsibility for NFS. He has provided regular counsel to NFS for several years.

In late March 2006, NFS' Chief Executive Officer and its General Counsel became aware of certain information indicating that an NFS executive may have violated NFS' fitness-for-duty ("FFD") Policy. In light of the serious nature of the matter, these individuals tasked Mr. Shapiro with conducting a fact-finding investigation into the concern so that he could provide advice and counsel to NFS on how to address the situation. NFS senior management notified NRC Region II management of its plan to investigate the matter and provided regular briefings to the Region on its findings. During the course of fact-finding investigation, NRC Region II sent to NFS a formal request that NFS investigate the allegation that an NFS executive violated the FFD Policy and report the results of its investigation to the NRC. NFS responded to this request within the 30 day time period required by the NRC.

Shortly after Region II required NFS to investigate the FFD allegation and reported its findings to the NRC, NRC OI opened an investigation into the same FFD allegation and demanded numerous documents and employee interviews. To date, OI has conducted four rounds of transcribed interviews of numerous NFS employees ranging in title from Administrative Assistant to Chief Executive Officer. In many cases, OI has interviewed

individuals two and three times, and issued numerous document requests. NFS is aware that OI has also conducted numerous interviews of non-NFS employees. OI conducted these interviews in June 2006, September 2006, April 2007 and July 2007. Mr. Shapiro represented NFS and many of its employees during the course of the OI investigation and interviews. Mr. Shapiro continues to represent NFS on this and other matters.

Despite NFS' urging that OI complete its investigation in order to permit the NRC Staff to bring this matter to resolution, and OI's repeated representations that its investigation was nearing completion, the OI investigation remains open some 19 months after it commenced.

B. December 3, 2007 Request for Interview and Subpoena

On December 3, 2007, Mr. Shapiro received a phone call from Ms. Cheryl Montgomery, the Field Office Director for the NRC Region II OI Field Office. Also on this call representing the NRC were Irwin Rothschild, Esq., Assistant General Counsel for Legal Counsel, Legislation, and Special Projects, and Andrew McFarlane, the NRC OI Special Agent investigating the instant matter. Ms. Montgomery stated that the purpose of the call was to request that Mr. Shapiro voluntarily submit to being interviewed regarding the FFD investigation. The sole basis offered by Ms. Montgomery for requesting that Mr. Shapiro be interviewed was that the investigation was "on the critical path toward completion." In addition, Ms. Montgomery suggested that, because Mr. Shapiro acted as an investigator into the alleged regulatory violations by NFS, the traditional privileges for an attorney would not apply.

Mr. Shapiro responded that OI's request would assuredly infringe upon the attorney-client privilege and attorney work product protection. Mr. Shapiro also noted that, in all likelihood, most if not all questions posed could not be answered based on privilege, thereby

making the interview a waste of time and resources. As an alternative, Mr. Shapiro offered to receive written questions from NRC OI that OI believed would not elicit privileged responses in order to satisfy OI's need for information. If such a response met OI's need for information, then the request for interview would become moot. If, however, the responses to written questions did not meet OI's need for information, then OI could revisit the interview request.

OI's immediate response to this offer of cooperation was to ask whether Mr. Shapiro would accept service of an agency subpoena by facsimile, or if personal service was necessary. Mr. Shapiro expressed his disappointment in OI's refusal to consider his request for written questions and agreed to accept service by facsimile. On that same day, Mr. MacFarlane faxed the Subpoena to Mr. Shapiro's attention. The Subpoena commands Mr. Shapiro to appear at the NRC headquarters on January 9, 2008 to provide testimony.

II. THE COMMISSION SHOULD QUASH THE SUBPOENA

NRC OI has provided no basis on which to sustain the Subpoena other than its claim that Mr. Shapiro's testimony is necessary because the investigation is "on the critical path toward completion." However, federal precedent requires a far greater showing in order to compel the testimony of counsel related to a matter for which counsel was retained. Under this heightened standard, three criteria must be met: (1) no other means exist to obtain the information; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case. Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986); see also Nationwide Mut. Ins. Co. v. Home Ins. Co., 278 F.3d 621, 628 (6th Cir. 2002) (adopting the Shelton criteria); Boughton v. Cotter Corp. 65 F.3d 823, 830 (10th Cir. 1995) (approving the Shelton criteria); Saldana-Sanchez v. Lopez-Gerena, 256 F.3d 1, 5 n.9 (1st Cir

2001) (citing Shelton).[4] None of the three factors are met here: the Subpoena would infringe upon the attorney-client and attorney work product privileges; other means exist for NRC OI to obtain the information it seeks; and NRC OI has not claimed, let alone demonstrated, that the information it needs is crucial to the preparation of its case. Therefore, the Commission should quash the Subpoena.

A. The Subpoena Infringes Upon The Attorney-Client Attorney Work Product Privileges

NRC OI attempts to compel the testimony of Mr. Shapiro, seeking information related to the very work performed by Mr. Shapiro as outside counsel to NFS. Neither NFS nor Mr. Shapiro is presently aware of the precise information sought by NRC OI. Nevertheless, clairvoyance is not required to see that the attorney-client communication and attorney work product privileges would be immediately infringed by compelling Mr. Shapiro's oral testimony. Mr. Shapiro has no independent or firsthand knowledge of the facts surrounding the alleged regulatory violations at issue here, nor was he personally involved in the events giving rise to the alleged violations. Rather, any information Mr. Shapiro might have regarding the alleged violations would have been communicated to him by officers or employees of his client NFS during the course of Mr. Shapiro's representation of NFS. See Sparton Corp. v. U.S., 44 Fed. Cl. 557 (1999) (barring deposition of government attorney with no independent or first hand knowledge of the facts, or with direct involvement in events giving rise to the claim).

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[4] The Commission should apply the Shelton criteria to the instant case. In addition to being adopted or approved of by several U.S. Courts of Appeal, the Shelton criteria have been widely followed in the district courts. See, e.g., N.Y. v. Solvent Chem. Co., 214 F.R.D. 106, 112 (W.D.N.Y. 2003); In re Linerboard Antitrust Litig., 237 F.R.D. 373, 385 (E.D. Pa. 2006). Although the Second Circuit has declined to adopt the Shelton criteria, In re Subpoena Issued to Dennis Friedman, 350 F.3d 65, 71-72 (2d Cir. 2003), it has cited Shelton for the proposition that depositions of opposing counsel are disfavored. See id. (citing U.S. v. Yonkers Bd. of Educ., 946 F.2d 180, 185 (2d Cir. 1991).

Thus, Mr. Shapiro could testify only to communications received from NFS employees, or to his mental impressions and legal strategy regarding the investigation. Federal and Commission precedent protect against the disclosure of such privileged information.

1. The Attorney-Client Privilege

The attorney-client privilege "is the oldest of the privileges for confidential communications known to the common law" whose purpose is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981); see also Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 N.R.C. 181, 185 (1995) (citing Upjohn). The attorney-client privilege protects from disclosure confidential communications between the client and the attorney. In re Grand Jury Proceedings #5 Empanelled January 28, 2004 v. Under Seal, Defendant, 401 F.3d 247, 250 (4th Cir. 2005) (citing Upjohn). The attorney-client privilege protects not only the giving of professional legal advice by an attorney to a client, "but also the giving of information to a lawyer to enable him to give sound and informed advice." Upjohn, 449 U.S. at 390. Thus, confidential communications made by a company's employees to counsel at the direction of corporate superiors in order to secure legal advice from counsel are protected under the attorney-client privilege. Id. at 394. Protected communications include those made to counsel by members of the corporate "control group" and employees outside the control group. Id. at 392-96 (rejecting the more narrow test approved of by the below Court of Appeals, which would have protected communications only from the corporate control group"). Thus, any confidential

communications between NFS employees and Mr. Shapiro giving facts for the purpose of obtaining legal advice are protected.[5]

2. The Attorney Work Product Protection

The attorney work product protection shields an attorney's work done in preparation for litigation. Id. The attorney work product protection is grounded in the long established presumption that "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney." Hickman v. Taylor, 329 U.S. 495, 509 (1947). The privilege protects both "fact" work product, which consists of documents prepared by an attorney that do not contain the attorney's mental impressions, and opinion work product, which does contain an attorney's mental impressions. In re Grand Jury Proceedings #5, 401 F.3d at 250. Fact work product "'can be discovered upon a showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship.'" Id. (citing In re Grand Jury Proceedings, Thursday Special Grand Jury Session Sept. Term, 1991, 33 F.3d 342 348 (4th Cir. 1994)); see also Fed. R. Civ. P. Rule 26(b)(3)(A). Opinion work product "is 'more scrupulously protected as it represents the actual thoughts and impressions of the attorney.'" In re Grand Jury Proceedings #5, 401 F.3d at 250 (citing In re Grand Jury Proceedings, Thurs. Special Grand Jury Session, 33 F.3d at 348). Work product that reveals an attorney's mental processes "cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship" and requires "a far stronger showing of necessity and unavailability by other means." Upjohn, 449 U.S. at 401-02.

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[5] Because the attorney-client privilege exists for the benefit of the client, the client holds the privilege. In re Grand Jury Proceedings #5, 401 F.3d at 250.

Moreover, the Supreme Court has long questioned the utility of opinion work product. Compelling production of opinion work product would "force[] the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks" and "[s]uch testimony could not qualify as evidence." Hickman, 329 U.S. at 513. Thus, any of Mr. Shapiro's opinion work product, such as his thoughts, impressions, memories, or other mental processes are protected against disclosure.[6]

3. Mr. Shapiro's Role As Investigator Does Not Waive Either Protection

During the December 3 teleconference, NRC OI suggested that because Mr. Shapiro investigated the alleged regulatory violations on NFS' behalf, the traditional protections afforded attorney-client communications and attorney work product would not apply. Such a suggestion has no merit and has been expressly rejected by the Commission. In Vogtle, the Commission answered the question of whether notes taken by an attorney for a licensee on communications with that licensee's employee were privileged under the attorney-client privilege and the attorney work product doctrine. Vogtle, CLI-95-1, 42 N.R.C. at 182. In concluding that the notes were privileged, the Commission addressed the argument that the notes must be disclosed because the licensee employed the attorney not for legal advice but to investigate facts associated with the underlying alleged violations, claiming that such was a business function not encompassed by any privilege. Id. at 188. The Commission rejected that argument, holding

> [t]hat [the fact that licensee] officers could have themselves undertaken an investigation of the allegations and drafted a response to the NRC does not eclipse the special role and training that an attorney might bring to bear in "sifting through the facts"

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[6] Because the work product privilege protects not only the attorney-client relationship but also the interests of attorneys in their own work product, both the client and the attorney hold the work product privilege. In re Grand Jury Proceedings #5, 401 F.3d at 250.

> for the legally relevant, particularly given that at the time [the licensee] was the subject of at least two federal investigations into alleged serious regulatory and criminal violations.

Id. at 188 (footnote omitted). Vogtle is directly on point to the instant matter. NFS was the subject of a federal investigation into alleged regulatory violations and hired Mr. Shapiro as outside counsel to investigate those alleged violations and to provide counsel on addressing the findings of his investigation. Mr. Shapiro was acting in a legal capacity when he conducted his investigation and advised NFS of his findings and their potential legal significance. Therefore, Mr. Shapiro's role as an investigator does not negate the attorney-client privilege or the attorney work product protection.

4. Summary

Federal case law and Commission precedent hold that the attorney-client privilege and attorney work product protection preclude the compelled testimony of Mr. Shapiro concerning any communications between him and NFS employees, and his work product pertaining to his investigation of the alleged regulatory violations. Consequently, NRC OI has failed to meet the Shelton requirement that the information it seeks from Mr. Shapiro be non-privileged.

B. NRC OI Has Other Means to Obtain The Desired Information

NRC OI has means other than an interview of Mr. Shapiro to obtain the information it seeks. Thus, this Shelton criterion is not met.

Since the OI investigation began over 19 months ago, OI has had access to every person with knowledge of, and every document relevant to, the alleged regulatory violations. All of the relevant documents and all of the individuals with knowledge of the events concerning the alleged regulatory violations remain available to OI should it believe more information is

needed. The bottom line is that OI has ample means to obtain whatever relevant information it believes necessary to complete its investigation. The only possible purpose of the interview is to pick through what Mr. Shapiro thought important (i.e., his work product) or what NFS employees told to Mr. Shapiro (i.e., attorney-client communications), which federal and Commission case law prohibit.

Moreover, during the December 3 teleconference, Mr. Shapiro offered to receive written questions to the extent that the questions call for responses based upon non-privileged information. NRC OI summarily rejected this compromise, providing no justification other than stating that written questions "are not the normal course" for NRC OI investigations. That NRC OI merely prefers counsel to submit to oral examination rather than to answer written questions falls far short of the mark set by Shelton. NRC OI cannot avoid the requirement to obtain the desired information by other means simply by claiming that such other means are not how it conducts business. Otherwise, the first Shelton requirement would be rendered meaningless. Further, given the number of U.S. Courts of Appeals and U.S. District Courts that follow Shelton and require a heightened showing before compelling the testimony of counsel, it is safe to say that compelling counsel to testify is not in the "normal course" of conduct in our judicial system. NRC OI cannot compel Mr. Shapiro's testimony without first exhausting the other means available to it to obtain the information it seeks.[7]

[7] NFS and Mr. Shapiro hereby renew their offer for Mr. Shapiro to receive written questions to the extent that the questions call for responses based on non-privileged information in order to assist OI in obtaining the information it seeks.

C. The Sought After Information is Not Crucial to the Preparation of the Case

The Subpoena fails to meet the last Shelton criterion because NRC OI has failed to claim or demonstrate that the information it seeks from Mr. Shapiro is crucial to the preparation of the case. NRC OI claims that Mr. Shapiro's testimony is necessary because its investigation of the alleged violation is on "the critical path toward completion." In other words, it seems that OI's case is nearly wrapped up. It cannot be, then, that the case *hinges* on information still in Mr. Shapiro's possession. While it may be more convenient and expeditious for NRC OI to wrap up its case by obtaining Mr. Shapiro's testimony, "such considerations of convenience" are foreclosed by controlling Supreme Court precedent that protect "the policies served by the attorney client privilege." Upjohn, 449 U.S. at 396 (citing Hickman, 329 U.S. at 516 ("Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary.") (Jackson, J., concurring)). Therefore, this Shelton criterion has not been met.

III. CONCLUSION

For the reasons set forth above, the Commission should quash the Subpoena. NRC OI has failed to demonstrate that (1) the information sought is non-privileged; (2) no other means exist to obtain the information it seeks from Mr. Shapiro; and (3) the information sought is crucial to the preparation of its case.

Respectfully submitted,

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Counsel for NFS and Daryl M. Shapiro, Esq.

Dated: January 7, 2008

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SHAPIRO, ESQ OF PILLSBURY	)
WINTHROP SHAW PITTMAN LLP	)
IN NRC INVESTIGATION NO.	)
2-2006-017	)

NOTICE OF APPEARANCE

The undersigned, being an attorney at law in good standing admitted to practice before the courts of the District of Columbia and the Commonwealth of Virginia, and various federal courts, hereby enters his appearance as counsel on behalf of licensee Nuclear Fuel Services, Inc., 1205 Banner Hill Road, Erwin, TN 37650, and Daryl M. Shapiro, Esq., 10221 Sweetwood Ave., Rockville, MD 20850, in any proceeding related to the above-captioned matter.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Motion to Quash the December 3, 2007 NRC Office Of Investigations Subpoena Issued to Daryl M. Shapiro, Esq."; the "Notice of Appearance" for Jack McKay; and the "Notice of Appearance" for Timothy J. V. Walsh have been served on the following this 7th day of January 2008, by facsimile and first class mail:

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