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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Peter B. Bloch, Chair
Dr. James H. Carpenter
Thomas D. Murphy

In the Matter of	
GEORGIA POWER COMPANY et al.,	Docket Nos. 50-424-OLA-3 50-425-OLA-3
(Vogtle Electric Generating Plant, Unit 1 and Unit 2)	Re: License Amendment (transfer to Southern Nuclear)
	ASLBP No. 93-671-01-OLA-3

ALLEN MOSBAUGH'S RESPONSE TO THE BOARD'S APRIL 21, 1993 SCHEDULING ORDER AND REQUEST FOR A PROTECTIVE ORDER

Status of the Tapes

Allen Mosbaugh, through counsel, hereby responds to the Atomic Safety and Licensing Board ("AS"B") Memorandum and Order (Ruling on Stay Request and on Scheduling), dated April 21, 1993. Therein, the ASLB stated that:

> Counsel for Mr. Allen Mosbaugh shall make a good faith, ernest request for the return of Mr. Mosbaugh's copies of the tapes he had made from the Congressional committee to which he has given those tapes. He shall report to us on his efforts and the response he has received, in a document that is received by us and the parties by May 14, 1993.

In response to the request of the ASLB, counsel states as follows:

1. In June of 1990, Allen Mosbaugh's counsel had excerpts of certain tape recordings prepared. These recordings constitute counsel's work product and are predicated on attorney-client

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communications. A total of six (6) such tape recordings were made in preparation of litigation pending before the U.S. Department of Labor. The recordings were also utilized by counsel to file a petition with the Chairman of the U.S. Nuclear Regulatory Commission on September 11, 1990.

2. In September of 1990, Allen Mosbaugh turned over all his original tape recordings to the U.S. Nuclear Regulatory Commission ("NRC") Office of Investigations ("OI)"). He did not maintain any copies of these original tape recordings. The only original tape recordings presently in his possession are those that were returned to him by the NRC (copies of which were made available to Georgia Power Company). Mr. Mosbaugh also maintained possession of the six recordings identified in paragraph 1.

3. On July 28, 1992, John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, requested, pursuant to Rules X and XI of the Rules of the U.S. House of Representatives, that Mr. Mosbaugh's counsel provide all tape recordings (as well as other documentation) in his possession to the Subcommittee. A Copy of Chairman Dingell's letter is appended as Attachment 1.

4. On July 29, 1992, after consulting NRC-OI (who indicated that the documentation could be turned over to the Subcommittee), counsel to Allen Mosbaugh provided the six (6) tape recordings identified in paragraph 1 to the Subcommittee.

5. The recordings were explicitly provided on condition that they be kept confidential.

6. These six (6) tape recordings include segments of some of the tape recordings that were previously released by NRC (and copied by GPC). Moreover, these tape recordings include segments of recordings that are still in the possession of NRC.

7. Mr. Mosbaugh presently has control over the six recordings identified in paragraph 1.

8. These recordings, in there present form, constitute the work product of Mr. Mosbaugh's counsel (because their creation was based on attorney-client communications for use by counsel in various legal proceedings). Mr. Mosbaugh objects to the release of these six (6) tape recordings.

9. When GPC is entitled to the original tape recordings, these recordings must be obtained from the NRC. At the present time all of the original tape recordings are in the possession of the NRC.

Request for Protective Order

GPC should not be granted access to the tape recordings until Mr. Mosbaugh and the NRC Staff have an opportunity to conduct the depositions of the relevant GPC employees and managers. It is well settled, as a matter of law, that a court should allow a persons deposition to go forward prior to giving the deponent access to his or her prior statements:

> The Advisory Committee Notes [to the Federal Rules of Civil Procedure] state "[i]n appropriate cases the court may order a party to be deposed before his statement is produced," (Rule 26 committee note)...because "there is a legitimate interest in receiving a version of the party's testimony which has not been tailored to conform to an earlier statement." 4 Moore's Federal Practice ¶ 26.65.

Miles v. M/V Mississippi Queen, 753 F.2d 1349, 1351 N. 3 (5th Cir. 1985). Accord., Smith v. China Merchants, 59 F.R.D. 178, 179 (E.D. Penn. 1972).

In fact, requiring a person to be deposed prior to giving that person access to a prior statement is the "usual situation." Nelson v. Puerto Rico Marine Management, Inc., 72 F.R.D. 637, 638 (D. Md. 1976).

In this case, requiring GPC witnesses to be deposed prior to releasing the tapes to GPC not only conforms to standard civil discovery practice, but also serves the interests of justice. GPC witness are likely to be more candid and forthcoming at their depositions if they are deposed prior to production of the tape recordings. Additionally, the witnesses would be not be able to tailor their testimony to conform to their earlier statements or to rationalize their taped remarks.

In order to avoid delay in these proceedings, Mr. Mosbaugh would consent to deposing the witnesses who are recorded on tape as quickly as possible. Once these depositions are completed, the NRC Staff should be compelled to provide both GPC and Mr. Mosbaugh copies of the tapes along with any transcripts of the tapes which they prepared.

Conclusion

Six (6) tape recordings are currently in the possession of Mr. Mosbaugh's counsel. This Board should not require Mr. Mosbaugh to release any of these tape recordings, as they constitute the work product of Mr. Mosbaugh's counsel. In addition, this Board should not require the release of any tape recordings relevant to this case to GPC until after Mr. Mosbaugh has an opportunity to depose the witnesses.

Respectfully submitted,

Michael D. Kohn
KOHN, KOHN & COLAPINTO, P.C.
517 Florida Ave., N.W.
Washington, D.C. 20001

(202) 234-4663

Dated: May 14, 1993

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JOHN D. DINGELL, MICHIGAN, CHAIRMAN

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REID P.F. STUART, STAFF DIRECTOR/CHIEF COUNSEL
STEPHEN F. SIMS, DEPUTY STAFF DIRECTOR

U.S. House of Representatives
Subcommittee on Oversight and Investigations
of the
Committee on Energy and Commerce
Washington, DC 20515-6116

July 28, 1992

Mr. Michael D. Kohn
National Whistleblower Center
517 Florida Avenue, N.W.
Washington, D.C. 20001

Dear Mr. Kohn:

Pursuant to Rules X and XI of the Rules of the U.S. House of Representatives, the Subcommittee on Oversight and Investigations is conducting an investigation into the circumstances surrounding a March 20, 1990 incident at the Georgia Power Vogtle Plant. In order to facilitate our inquiry, please provide copies of all tapes, transcripts, depositions, correspondence, and the like in your possession pertaining to the above incident.

Your prompt response in this matter will be greatly appreciated.

Sincerely,

John D. Dingell
Chairman
Subcommittee on
Oversight and Investigations

cc: The Honorable Thomas J. Bliley, Jr.
Ranking Republican Member
Subcommittee on Oversight and Investigations

NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

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(Vogtle Electric Generating Plant, Unit 1 and Unit 2)	ASLBP No. 93-671-01-OLA-3

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 1993, a copy of the foregoing was ("*" indicates service by facsimile) served by first class mail upon the following:

*Hon. Peter B. Bloch, Chair
*Hon. James H. Carpenter
*Hon. Thomas D. Murphy
Administrative Law Judges
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
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Office of the Secretary (Original and two copies)
Attn: Docketing and Service
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Stephen M. Kohn

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