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July 23, 1993
USNRC

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

'93 JUL 26 P4:11

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

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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

INTERVENOR'S MOTION TO COMPEL PRODUCTION
OF AFFIDAVITS IN THE POSSESSION OF GEORGIA POWER COMPANY

I. BACKGROUND

On July 13, 1993, Georgia Power Company ("GPC") filed with the Atomic Safety and Licensing Board ("ASLB") GPC's First Supplemental Response to Allen Mosbaugh's First Set of Interrogatories ("GPC's Supplemental Response"). On page 6, GPC supplements its response to Intervenor's interrogatory question No. 54, by acknowledging that GPC obtained signed statements from John Aufdenkampe, Thomas Webb, Jack Stringfellow, and George Hairston. GPC objected to producing these four statements based on attorney-client and the work-product privilege.

With respect to these four affidavits, Intervenor asserts that the work product and attorney client privileges were waived or not applicable and, pursuant to 10 C.F.R. § 2.740(f), asks this Board to compel their production.

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II. FACTS

On June 29, 1993, the parties to this proceedings participated in a discovery conference. During this conference, Intervenor's counsel advised GPC's counsel that its response to interrogatory No. 54 to Intervenor's first set of interrogatories was defective inasmuch as part (f) required GPC to "identify all documents" that "relate in any manner" to conversations held on April 19, 1990 concerning LER 90-006. Specifically, Intervenor's counsel advised GPC's counsel that Mr. John Aufdenkampe previously stated to Mr. Mosbaugh that he was being "hounded" by GPC lawyers to sign an affidavit GPC's counsel had prepared concerning his participation in a conversation occurring on April 19, 1990. Mr. Aufdenkampe further advised Mr. Mosbaugh that GPC counsel told him that everyone on the April 19, 1990 call had executed or were in the process of executing sworn affidavits regarding the events related to the issuance of LER 90-006 and that each and every other person indicated that Mr. Hairston was not a participant in the April 19, 1990 phone call.

Thereafter, GPC's counsel agreed to supplement its response to Interrogatory No. 56. On July 13, 1993, GPC filed a supplemental response to interrogatory No. 54, acknowledging that GPC was in possession of signed statements from John Aufdenkampe, Thomas Webb, Jack Stringfellow, and George Hairston. Finally, it should be pointed out that these affidavits were obtained before these licensing proceedings were filed before matters related to the Diesel Generators were referred to the U.S.

Department of Justice, and that these statements were apparently prepared in response to a 10 C.F.R. §2.206 petition filed by intervenor.

III. DISCUSSION

It is well established that discovery rules "are to be accorded a broad and liberal treatment" with the understanding that "mutual knowledge of the relevant facts gathered by both parties is essential to proper litigation." Southern Railway Company v. Carl Talmadge Lanham, 403 F.2d 119 (5th Cir. 1969) citing Hickman v. Taylor, 329 US at 507.

Under Rule 26(b)(3) of the Federal Rules of Civil Procedure, parties are entitled to statements made by a party that are in the possession of another party, including written statements signed or otherwise adopted or approved by the person making it. Clearly, Intervenor is entitled to sworn statements in the possession of GPC. The two grounds GPC claims for denying Intervenor access to these statements are work product and attorney client privilege.

1. THE WORK PRODUCT PRIVILEGE CANNOT APPLY BECAUSE THE AFFIDAVITS ARE LIMITED TO FACTUAL STATEMENTS OF WITNESSES AND DO NOT CONTAIN NOTES OR MENTAL IMPRESSIONS OF AN ATTORNEY.

"At its core, the work product doctrine shelters the mental process of the attorney, providing a privileged area within which he can analyze and prepare his client's case." United States v. Nobles, 422 U.S. 225, 239, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975). Sworn affidavits that are currently in the control of GPC or its counsel are not work product if these affidavits merely set out

facts the declarant adopted as true at the time the affiant signed the affidavit before a notary.¹ Just because a sworn statement of a witness may no longer be helpful to GPC and because these affidavits, after they were signed, were retained by GPC's counsel, does not make them "work product."²

As the affidavits in question directly relate to events related to the issuance of LER 90-006; they are responsive to a pending document request; they do not include the mental impressions of an attorney; and they are limited to factual statements of persons who will most probably testify before in this proceeding. As such, once these affidavits were signed and sworn to by the affiant, they no longer constitute the "work product" of an attorney, but constitute factual statements of the individuals who signed these affidavits.

2. THE ATTORNEY CLIENT PRIVILEGE DOES NOT APPLY BECAUSE THE AFFIDAVITS ARE LIMITED TO FACTUAL STATEMENTS RATHER THAN COMMUNICATIONS BETWEEN AN ATTORNEY AND CLIENT FOR THE PURPOSE OF OBTAINING LEGAL ADVICE.

The attorney client privilege concerns "communications between lawyer and client," and in order for the communication to come within the scope of the privilege, "an attorney must show that the communication was made to him confidentially, in his

¹ The interview notes and other documentation relied upon by GPC's attorneys in drafting any such affidavit and the draft of an unsigned affidavit constitute work product, not the sworn statement of a witness.

² Assuming the other affidavits are similar in nature to the draft affidavit shown to Mr. Mosbaugh, these affidavits in no way contain mental impressions of attorneys, nor do they discuss opinions or legal theories, but merely set forth factual assertions.

professional capacity, for the purpose of securing legal advice or assistance." United States v. Ponder, 475 F.2d 37 (5th Cir. 1973). In this respect, the privilege "does not protect against discovery of underlying facts from their source, merely because those facts have been communicated to an attorney." Georgia Power Company, et.al, (Vogtle Electric Generating Plant, Unites 1 and 2), LBP-93-11, at p. 8 (June 24, 1993), quoting Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP82-82, 16 N.R.C. 1144 (1982). The sworn affidavits in question do not constitute attorney-client communications just because they are in the possession of GPC's counsel; the communication must be for the purpose of securing legal advice or assistance. In the instant matter, the affidavits were not signed by these individuals for the purpose of securing legal advise or assistance. Rather the affidavits were created during an investigation by GPC's counse^r and reflect factual statements the affiant allegedly believed to be true.

The facts here are parallel to those of Diamond, et al., v. City of Mobile, 86 F.R.D. 324 (S.D.Alabama 1978). In the Diamond case, the court considered the releasability of statements obtained by a city attorney during the course of an investigation. Collins, the city attorney for the City of Mobile, conducted an internal investigation of the Mobile Police Department after allegations of brutality were raised. The purpose of his activities was not to provide legal advice or assistance to the persons questioned, but rather to provide his

client, the City of Mobile, with factual information relating to alleged indiscretions by the police department. Diamond, 86 F.R.D. at 327-328. The court found that, even though Collins informed each person questioned that a confidential relationship existed, no attorney-client privilege attached and the statements were deemed releasable. The court reasoned that where the attorney's investigation was not aimed at providing legal advice or assistance to the individual police officers, but was rather undertaken to provide the city with information about the alleged misconduct by the police department, then statements made by the individual police officers to the city attorney during the course of the investigation were not privileged. The same applies here. With respect to GPC, the affidavits were obtained before this proceeding was initiated; before NRC forwarded information to the U.S. Department of Justice; and only to allow GPC to better establish a factual basis to refute allegations Mr. Mosbaugh raised in a 10 C.F.R. §2.206 petition.

The affidavits were obtained from GPC's benefit rather than to provide legal assistance or advice to the affiants. As such, GPC counsel's gathering of information related to allegations of wrongdoing is no more entitled to the claim of privilege than the statements obtained by the city attorney in the Diamond case.

3. EVEN IF EITHER THE WORK PRODUCT OR ATTORNEY CLIENT PRIVILEGE WAS APPLICABLE, THE PRIVILEGE WAS WAIVED.

Beyond the fact that these documents do not constitute work product or attorney client communications, Mr. Aufdenkampe's communications with Mr. Mosbaugh work to waive any legitimate

claim of privilege GPC could otherwise raise. Specifically, the privileges were waived when Mr. Aufdenkampe: 1) advised Mr. Mosbaugh of the existence of the affidavits; 2) advised Mr. Mosbaugh of the factual statements contained in the affidavits (i.e., the fact that the affiant denied that Mr. Hairston was on the late afternoon conference call of April 19, 1990); 3) advised Mr. Mosbaugh that he had initially refusal to sign the affidavit prepared by GPC's counsel because it contained false information; 4) advised Mr. Mosbaugh of conversations he had with GPC's counsel as to why he should sign the earlier draft of the affidavit (i.e., everyone else remembered the call differently than Mr. Aufdenkampe did in that all of the other affiants did not recall Hairston ever being on the call); and 5) allowed Mr. Mosbaugh to physically review a copy of an affidavit prepared by GPC's counsel.

4. EVEN IF THE WORK PRODUCT PRIVILEGE DID APPLY, INTERVENOR HAS A SUBSTANTIAL NEED FOR THE STATEMENTS IN ORDER TO PREPARE HIS CASE AND IS UNABLE TO OBTAIN THE EQUIVALENT WITHOUT INCURRING SUBSTANTIAL HARDSHIP.

Intervenor maintains that the statements are related to the factual bases because they include false assertions made to refute allegations relating to the issuance of LER 90-006. Intervenor believes that these statements may constitute evidence related to a pattern and practice of making up factual assertions by Southern Nuclear and GPC personnel rather than tell the truth.

Intervenor's request for this documentation satisfies the substantial needs requirement set out in 10 C.F.R. §2.740(b)(2) because Intervenor cannot obtain the substantial equivalent of

the statements by other means. In this regard, assuming these statement contain false or contradictory information to the positions (which Intervenor believes they do), then the statements constitute essential evidence related to Intervenor's assertion that managers associated with Southern Nuclear and GPC are willing to submit false information in order to derail allegations raised in the 2.206 petition filed by Intervenor. By not obtaining the affidavits, it will be impossible for Intervenor to establish through interviews or depositions the exact content of the affidavits, and it will hamper Intervenor's ability to inquire into the meaning of the statements set out in the affidavits. Moreover, the witness' candor cannot be assured.

CONCLUSION

For the foregoing reasons, Intervenor respectfully requests the board to compel GPC to produce the signed affidavits of John Aufdenkampe, Thomas Webb, Jack Stringfellow, and George Hairston.

Respectfully submitted,



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Dated: July 23, 1993

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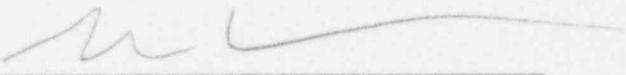
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