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

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

GEORGIA POWER COMPANY'S  
MOTION TO COMPEL INTERVENOR'S  
PRODUCTION OF DOCUMENTS

I. INTRODUCTION.

Pursuant to 10 C.F.R. § 2.740(f), Georgia Power Company ("GPC") hereby moves to compel Intervenor Allen L. Mosbaugh to produce certain documents and information requested in Georgia Power Company's Third Set of Interrogatories and Request for Documents to Allen L. Mosbaugh, dated May 6, 1994 ("GPC's Discovery Request"). Intervenor's Amended Response to Licensee's Third Set of Interrogatories and Request for Documents ("Intervenor's Response"), was served on June 10, 1994 and corrected on June 13, 1994. Reminiscent of Intervenor's June 2, 1993 Response to the First Set of Interrogatories of Georgia Power Company, Intervenor's Response is incomplete and evasive,

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and the vague and unsubstantiated objections asserted by Intervenor do not excuse his non-responsiveness.

GPC's Discovery Request was reasonably calculated to identify the factual bases for and evidence relating to Intervenor's allegations and to obtain such relevant documentation pertaining to these allegations as Intervenor might have in his possession, custody or control. In response to GPC's requests to produce documents relating to Intervenor's allegations, including documents that Intervenor may use in this proceeding, Intervenor has declined to produce anything. Instead, Intervenor asserts unsupported privileges (informant's privilege, attorney-client and work product privileges, joint defense) in an attempt to conceal documentation prepared by Intervenor and provided to the NRC.<sup>1</sup>

An important reason for discovery is to eliminate the element of surprise in modern litigation. The process shortens the actual hearing, with its attendant expense and inconvenience,

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<sup>1</sup> Intervenor's Response is especially disappointing because GPC expected Intervenor to be forthcoming following discussions among the parties on June 1, 1994.

Intervenor's Response to Licensee's Third Set of Interrogatories and Request for Documents, served May 25, 1994, was not responsive to GPC's Discovery Request. GPC raised its concerns with Intervenor in the June 1, 1994 conference call among the parties. GPC explained its position that Intervenor should either make available to GPC any relevant documents which he has provided to the NRC or he should drop from this case the issues which are addressed in such documents. Intervenor represented that he would amend his response to identify and produce at least some relevant documents. Although Intervenor's Response provides some additional information not contained in its initial May 25, 1994 response, he has not produced a single document.

and increases the ability of the parties to develop a complete record. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 N.R.C. 317, 321-22 (1980). Consequently, subject to recognized privileges, discovery is available for the parties to obtain the fullest possible knowledge of the issues and facts within the scope of the proceeding before trial. South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit No. 1), ALAB-642, 13 N.R.C. 881, 882 (1981), citing Hickman v. Taylor, 329 U.S. 495, 501 (1946). Having made serious allegations, Intervenor, as he did in his June 2, 1993 Response to GPC's First Set of Interrogatories, again attempts to conceal the documents and evidence he might possess relating to those allegations. This places GPC at an unfair disadvantage and prevents GPC from preparing its case. A litigant may not make serious allegations against another party and then refuse to reveal whether those allegations have any basis. Susquehanna, supra, 12 N.R.C. at 339.

The Licensing Board has previously admonished Intervenor for his tactics in frustrating GPC's efforts to obtain discovery of matters which Intervenor may raise in this proceeding.

We are concerned about what we consider undue intransigence to discovery on the part of Mr. Mosbaugh, particularly with respect to his discovery responses that do not involve the Six Tapes. We are charged with compiling a full, orderly and complete record. In the interest of justice, we want all unprivileged facts on the table. In this administrative proceeding, there is little room for surprise tactics. The Board will not condone questionable tactics and practices similar to those that Administrative Law Judge Bernard J.

Gilday, Jr., complained of in prior litigation between these parties. [footnote omitted.]

If Mr. Mosbaugh has the goods, he should lay them on the table. We intend to address this issue in more detail in a Memorandum and Order dealing with Applicant's Motion to Compel of June 17, 1993.

Memorandum and Order (Order to Mr. Mosbaugh to Release Six Tapes), LBP-93-11, 37 N.R.C. 469, 470 (June 24, 1993).<sup>2</sup>

If Intervenor believes that the subject matter of its recent allegations should be considered in this proceeding, it should comply with the Board's admonishment above and produce those documents immediately, so that the parties may prepare and proceed to hearing. At this late juncture, in a proceeding now in its second year, there should be no room for a tactic of submitting strings of new allegations to OI and then claiming that hearings cannot proceed until investigations are complete. At this stage, Intervenor must make a choice. If Intervenor wants, for strategic reasons, certain issues to be investigated by OI without GPC's knowledge of the specific allegations, then such issues should not be considered further in this proceeding.

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<sup>2</sup> The June 17, 1993 GPC Motion to Compel referred to by the Board was filed by Licensee following Intervenor's Response to the First Set of Interrogatories of GPC, dated June 2, 1993. A Board order on that motion was unnecessary because Intervenor agreed to produce all relevant documents requested by GPC within Intervenor's possession or control, with the exception of privileged communications (which Intervenor agreed to index and provide such index to the parties) and certain allegations which Intervenor had provided to NRC and which Intervenor said it would release to GPC if NRC did not object. See letter from Intervenor's counsel to the Licensing Board, dated June 27, 1993. The NRC Staff did not object to the release of Intervenor's allegations and such documents were subsequently made available to GPC.

If, on the other hand, Intervenor wishes to pursue the matters in this proceeding, he should immediately produce the requested documents. Any other course is unduly prejudicial to GPC.

Intervenor's Response is troubling for another reason. In addition to Intervenor's concealment of relevant documents, GPC has serious doubts about the accuracy of Intervenor's Response. Intervenor represents, for example, that he "has not compiled any documents at this time other than the documents relied upon in the deposition of Mr. Burr," in connection with allegations concerning the Vogtle diesel instrument control air system. Intervenor's Response at 4. Based on Board Notifications 94-08 and 94-09, Intervenor's past practice of providing numerous written allegations to NRC-OI, and the documents identified in Intervenor's Response at 11-13, GPC suspects that Intervenor is aware of and is concealing documents which he has prepared or is relying on respecting the Vogtle diesel instrument control air system. Also, with respect to those same allegations, Intervenor asserts that he "became aware of these matters in April 1994 while reviewing tapes returned from NRC and transcripts provided to GPC." Intervenor's Response at 4. This too appears to be

false.<sup>3</sup> Intervenor presumably became aware of these matters in 1990, when he made the tape recordings.

Further, Intervenor continues to ignore the Board's orders. On June 2, 1994, the Board issued a Memorandum and Order (Scope of Discovery) which made clear that the scope of this proceeding did not include a matter raised in Intervenor's initial May 25, 1994 response concerning "waiver of tech specs to facilitate mode change from mode 6 to mode 5 after the Site Area Emergency with both Diesels inoperable." Nonetheless, on the heels of this Order, Intervenor has stated its intention to raise this issue in this proceeding. See Intervenor's Response at 1-3.<sup>4</sup>

## II. Discussion.

GPC requests the Licensing Board to compel Intervenor to produce all non-privileged documents in his possession or control (including in the possession of his counsel) which are responsive to each of the requests contained in GPC's Discovery Request (other than documents which are already in GPC's possession).

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<sup>3</sup> There is an obvious incentive for Intervenor to take this position. If he actually became aware of these matters in 1990, rather than in 1994, as he now asserts, he is foreclosed from raising them now, except as late-filed issues. See Memorandum and Order (Georgia Power Motion to Reconsider the Scope of Proceeding), LBP-93-21, 38 N.R.C. 143, 148 (September 24, 1993); Memorandum and Order (Scope of Discovery), dated June 2, 1994, at 3-4.

<sup>4</sup> Intervenor also attempted to raise a similar issue in the deposition of Mr. George Frederick on June 17, 1994. At the time, the parties attempted, without success, to reach the Licensing Board chairman to resolve the issue.

A. Interrogatory and Document Request No. 1.

GPC's Interrogatory and Document Request No. 1 asked Intervenor to supplement his response to Interrogatory No. 12 (concerning the matters which Intervenor intends to or may raise in this proceeding) in his June 2, 1993 Response to GPC's First Set of Interrogatories, which he promised to do nearly one year ago. GPC also requested Intervenor to produce any documents identified in the supplemental response. GPC's Discovery Request at 7. In his response, Intervenor identified a number of additional matters which he may raise in this proceeding including (1) Board Notifications 94-07 and 94-08, (2) an issue concerning the waiver of Tech. Specs. to facilitate a mode change from Mode 6 to Mode 5, and (3) an issue concerning a GPC May 14, 1990 letter to NRC with respect to the site area emergency. Intervenor's Response at 1-2. This response is incomplete. Specifically, Intervenor did not identify or produce any documents, other than the allegations attached to Board Notification No. 94-07. Intervenor did not state any objections to GPC's Interrogatory and Discovery Request No. 1. Therefore, GPC requests the Licensing Board to compel Intervenor to provide a complete response to this request, including, without limitation, the identification and production of responsive documents.

Additionally, as discussed above, GPC has concerns with the accuracy of Intervenor's Response, at 3, concerning his allegations respecting the instrument air system for the Vogtle

diesel generators. GPC suspects that Intervenor has submitted written allegations on this matter to the NRC and asks that they be identified and produced.

B. Interrogatory and Document Request Nos. 3 and 4.

GPC's third and fourth discovery requests asked Intervenor to provide information concerning, and produce, all written communications, and identify any documents which discuss or are related to the communications, referred to in GPC's second discovery request (i.e., communications Intervenor has had concerning the allegations which he intends to or may raise in this proceeding). In response to these requests, Intervenor has produced no documents, although he provided a listing of seven items which Intervenor provided to the NRC, four of which are characterized as memoranda from Mr. Mosbaugh to his legal counsel concerning diesel generator related issues and two of which concern Board Notifications in this proceeding. Intervenor's Response at 11-13.

Despite the fact that the listed documents have been provided to the NRC (thereby waiving any privilege), Intervenor refuses to produce these documents based on (1) informant's privilege; (2) attorney-client and work product privileges; and (3) joint defense. Intervenor's Response, at 6, argues that he

notified NRC that he was providing certain information based on a concern that an unresolved safety problem may still exist at the plant and that the only documentation addressing this matter is set out in privileged communications in Intervenor's possession. Intervenor advised NRC that Intervenor was not willing to waive said

privilege. Eventually Intervenor provided certain documentation by way of a confidential written request made by NRC on Intervenor. As such, all such documents, including correspondence about the submission of documentation to NRC and the documents submitted are entitled to the informant's privilege and attorney-client and work product privileges.

Intervenor's claims fail for two reasons. First, Intervenor's assertions of privilege are too vague to be sustained. "The claimant of a privilege must bear the burden of proving that it is entitled to such protection, ... including pleading it adequately in its response." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 N.R.C. 1144, 1153 (1982) citing In re Fischel, 557 F.2d 209 (9th Cir. 1977). The documents which Intervenor attempts to withhold have all been provided to the NRC, waiving any privilege that may arguably have existed. Moreover, classification of these documents as attorney-client communications appears pretextual (i.e., an attempt to shield otherwise discoverable communications with the NRC by using Intervenor's counsel as a conduit).

Second, with respect to the vagueness of its assertions, Intervenor has failed to even identify which documents Intervenor claims are subject to these privileges and therefore exempt from disclosure. Intervenor provides no information concerning the communications which he asserts are privileged other than the statements quoted above.

Intervenor's mere assertion that the material he is withholding constitutes [attorney-client communications or] attorney work product is insufficient to meet his burden of

proving that the material is entitled to such protection. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-83-17, 17 N.R.C. 490, 495 (1983). Likewise, Intervenor's Response provides absolutely no explanation for his "joint defense" objection. GPC is unaware of any privilege available to Intervenor to which he may be referring. Intervenor's lack of discussion of this objection precludes GPC's ability to further respond to his general assertion. Therefore, Intervenor's assertion of the attorney-client and work product privileges and a "joint defense" objection are not properly stated objections.

Intervenor's assertion of the "informer's privilege" has even less merit. First, the informer's privilege is not available to Intervenor; it is "the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 N.R.C. 86, 91 (1983), quoting Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), ALAB-639, 13 N.R.C. 469, 473 (1981) and Roviaro v. United States, 353 U.S. 53, 59 (1957) (emphasis added). Second, the informer's privilege is available to protect the identity of individuals who provide information to the NRC. Id. In the context of a licensing proceeding, it cannot be used, even by the NRC Staff, to withhold the information which the informer provided to the NRC where such information relates directly to the substantive allegations at

issue in the proceeding or is otherwise necessary to a proper decision in the proceeding. See NRC Statement of Policy on Confidentiality, 50 Fed. Reg. 48506, 48508-09, November 25, 1985; South Texas Project, supra, 13 N.R.C. at 473.<sup>5</sup>

Unless Intervenor's assertion of the informer's privilege is intended to protect the identity of someone other than Mr. Mosbaugh, the assertion of that privilege in this proceeding, brought by the informer, is an unjustifiable maneuver to conceal relevant information. Mr. Mosbaugh's identity as an informer is already known to GPC, and the informer's privilege affords no protection to any documents he may have provided to NRC. Assuming such documents are relevant to the matters in controversy in this proceeding and within Intervenor's possession, custody or control, Intervenor must produce the documents to GPC. Otherwise, the Board should bar Intervenor from participating in this proceeding with respect to those issues to which such documents are relevant. See, e.g., Carolina Power and Light, et. al (Shearon Harris Nuclear Power Plant), ALAB-856, 24 N.R.C. 802, 810 (1986) (Appeal Board confirmed

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<sup>5</sup>In South Texas Project, an Intervenor sought to obtain the identity of confidential informants who had provided information concerning safety violations to the NRC. The licensing board below held that disclosure of such identities was necessary to a proper decision in the proceeding. The Appeal Board, however, found that such identities were not required to be disclosed because it was "not the individuals but their information [that was] of significance to the proceeding." 13 NRC 476-77. The NRC Staff had already disclosed the details of the information provided to the NRC by the informants.

licensing board's authority to dismiss contentions for failure of the intervenor to respond to the applicant's discovery requests).

Further, the documents which Intervenor seeks to withhold apparently are documents which he provided to the NRC. As the Licensing Board has previously held, "any privilege that might have attached was waived when they were provided to the Nuclear Regulatory Commission for a section 2.206 proceeding and for an investigation.... Documents that are privileged are kept private. They are not disclosed." LBP-93-11 supra, 37 N.R.C. at 475 citing Westinghouse Electric Corp. v. Republic of the Philippines, 951 F.2d 1414, 1427-30 (3d Cir. 1991). The Board also cited Synalloy Corp. v. Gray, 142 F.R.D. 266, 269 (D. Del. 1992) for the proposition that there is an implied waiver of privilege when a party puts protected information at issue by making it relevant to the case. 37 N.R.C. at 475 n.14. This is particularly applicable to what Intervenor has done. He is attempting to expand the scope of this proceeding with additional allegations, while concealing the documents relevant to those allegations.<sup>6</sup>

Intervenor asserts that he "provided certain documentation [to NRC] by way of a confidential written request made by NRC on Intervenor." Intervenor's Response at 6. GPC interprets this statement as implying that Intervenor has received a grant of confidentiality from the NRC. Were this true, there is no

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<sup>6</sup> Moreover, he attempts to manufacture a privilege by passing documents through counsel to the NRC. This is an abuse of the general benefits of privilege.

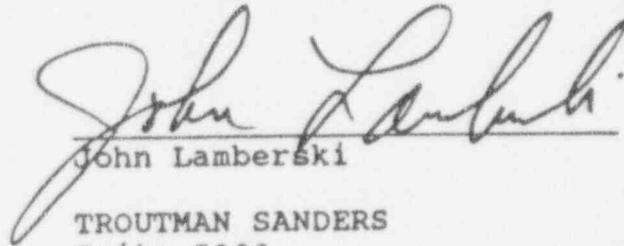
privilege that protects a document simply because a copy was given to a third party (or an agency) in confidence. In any event, there is no direct assertion by Intervenor that NRC has agreed to keep Intervenor's documents confidential. Further, Mr. Mosbaugh has waived his right to confidentiality because he has disclosed that he is the one who has provided NRC with the allegations contained in Board Notification 94-07, 94-08 and 94-09. See Intervenor's Response at 7.

Based on the foregoing, GPC requests the Board to find that Intervenor has failed to meet his burden of claimed privilege or to establish any recognized principle of joint defense or confidentiality which precludes discovery of the documents sought by GPC in its Interrogatory and Document Request Nos. 3 and 4.

### III. Conclusion.

For the reasons stated above, GPC moves the Licensing Board to compel Intervenor to produce the documents requested by Georgia Power Company's Third Set of Interrogatories and Request for Documents to Allen L. Mosbaugh, dated April 30, 1993, Request Nos. 1-4.

Respectfully submitted,

  
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Dated: June 22, 1994

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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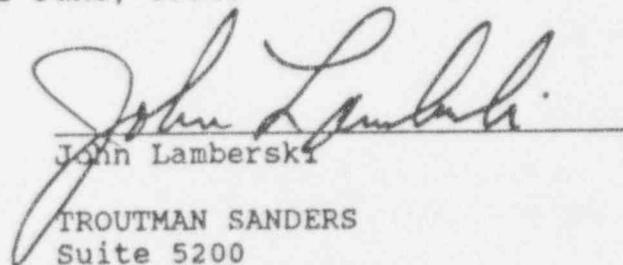
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(Vogtle Electric \* Re: License Amendment  
Generating Plant, \* (Transfer to Southern  
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\*  
\* ASLBP No. 93-671-01-OLA-3  
\*

CERTIFICATE OF SERVICE

This is to certify that copies of the within and fore-  
going "Georgia Power Company's Motion to Compel Intervenor's  
Production of Documents," dated June 22, 1994, were served  
on all those listed on the attached service list by  
depositing same with an overnight express mail delivery  
service and, where indicated by an asterisk, by facsimile.

This is the 22nd day of June, 1994.

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

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\* Re: License Amendment  
\* (Transfer to Southern  
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\* ASLBP No. 93-671-01-OLA-3

(Vogtle Electric  
Generating Plant,  
Units 1 and 2)

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