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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

SERVED JUL 15 1994

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

In the matter of

GEORGIA POWER COMPANY,
et al.

(Vogtle Electric Generating
Plant, Units 1 and 2)

Docket Nos. 50-424-OLA-3
50-425-OLA-3

Re: License Amendment
(Transfer to Southern
Nuclear)

ASLBP No. 93-671-01-OLA-3

MEMORANDUM AND ORDER
(Motion to Compel)

MEMORANDUM

The purpose of this Memorandum and Order is to determine a motion to compel (Motion) filed by Allen Mosbaugh (Intervenor) on June 22, 1994, "Intervenor's Motion to Complete Responses to Intervenor's Third Set of Interrogatory Questions and Document Request." Georgia Power Company, et al., (Georgia Power) filed its "Answer to Intervenor's Motion to Complete Responses to Intervenor's Third Set of Interrogatory Questions and Document Request," on July 7, 1994 (Answer).

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We shall consider each portion of the motion separately. The general principle governing our decision is found in 10 CFR § 2.740(b):

Discovery Methods. Unless otherwise limited by order of the presiding officer in accordance with this section, the scope of discovery is as follows:

(1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. . . .

(2) *Trial Preparation Materials.* A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (b)(1) of this section and prepared in anticipation of or for the hearing by or for another party's representative (including his attorney, consultant, . . .) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of this case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. . . .

Our decisions are motivated by our respect for the essence of the discovery process. It is inevitable that communication problems will occur when one party demands information from another. Naturally, parties try to overspecify their demands, hoping they will receive what they really need. Sometimes parties use language that is difficult to interpret. It is our intention, in deciding discovery motions, to avoid causing undue burden and hardship. We are also guided by a desire to see essential information communicated so that each party may develop a

full understanding of the key facts. In that way, counsel for the parties may be fully informed so that they may properly assist the Board in developing a complete and accurate record.

Let us remind the parties, at this time, of their continuing responsibility to supplement their responses to interrogatories pursuant to 10 CFR § 2.740(e).

I. Interrogatory 1

Intervenor surreptitiously recorded on tape many conversations that occurred among Georgia Power employees. Georgia Power has transcribed some of these tapes and has made available to Intervenor all the transcripts that are relevant to the diesel generator issue. Intervenor claims it should have access to all the other tapes because, "The tapes form a complete documentary picture of the events occurring during the site area emergency as well as Georgia Power's response to the emergency."

Georgia Power responds that it already has given Intervenor copies of all transcripts relevant to this proceeding.¹ It has other, nondisclosed transcripts, that it made because it believed them relevant to other proceedings.² Georgia Power indicates that its selection of sections to

¹Answer at 2, 3-4.

²Answer at 3.

transcribe was attorney work product. Furthermore, Georgia Power reminds us that Intervenor has the original tapes and therefore has access to all the information in them.³

We conclude that Intervenor has failed to demonstrate that there are relevant documents that we should order to be disclosed. Therefore, this portion of his request shall be denied.

II. Interrogatory 2

Intervenor finds Georgia Power's answers to this interrogatory inadequate. We have no basis to say so. Georgia Power states, at p. 6 of its answer:

GPC's [Georgia Power's] response identified those persons known to GPC to have been a party to that call [the telephone conference call of April 19, 1990, between the Vogtle site and corporate offices]. Next, Intervenor asserts, "the exact offices are not specified (i.e., GPC only provides the building and not the offices within the building." Id. GPC's Response stated that Messrs. Aufdenkampe and Mosbaugh were in Mr. Aufdenkampe's office, Mr. Bockhold was in Mr. Bockhold's office, and Messrs. Hairston, McCoy, Shipman, and Stringfellow were in Building 42 of the Inverness Center office park near Birmingham. GPC cannot identify the specific office or offices in Birmingham in which the conference call took place.

We note that the tone of this response is far different from the belligerent tone of Georgia Power Company's Response to Allen L. Mosbaugh's Third Set of Interrogatories (Inter-

³If, within two weeks, Intervenor identifies specific sections of tapes for which it seeks transcripts, we are hopeful that Georgia Power would accommodate him. If there is no accommodation, a further discovery motion could be promptly filed.

rogatory Response), June 10, 1994 at 34. The Interrogatory Response appeared to limit Georgia Power's knowledge to what it gleaned from tape transcripts and it also limited the response to people who spoke during the call. Georgia Power may have additional sources of information, including conversations with its employees, that should be disclosed in discovery. We expect that the passage we cited above is based on all Georgia Power's current information and not just on tape transcripts.⁴

It is not clear from Georgia Power's response whether it has disclosed the names, if any, of witnesses to the call who heard what transpired but did not speak. The original interrogatory, in our opinion, was vague about whether such names should be disclosed. However, given the importance of these telephone calls, we expect Georgia Power to disclose nonspeaking witnesses to Intervenor. Accordingly, with the exception of disclosing whether it knows of any nonspeaking witnesses, Georgia Power need make no further response to this interrogatory.

III. Interrogatory 3

Our Order of June 9, 1994 (Board Issues and Concern, unpublished) requests more detail than Intervenor requested.

⁴If Georgia Power has additional information from its conversations with its employees, we expect it to disclose that information.

Answers to our questions are due July 21, 1994. Hence, this dispute is largely moot.

The one hotly contested issue that survives is whether Georgia Power must perform fresh analyses to respond to interrogatories. We hold that it need not perform those analyses because they are not relevant to the issues before us. A freshly performed analysis could not shed light on whether Georgia Power improperly withheld information from the Nuclear Regulatory Commission, *prior to the time the analysis was performed.*

IV. Interrogatory 4

Georgia Power attempted to respond to the interrogatory by deciding that some of the terms used by Intervenor were equivalent to one another. This may have been the best it could do at the time. However, Intervenor has now provided references that define the terms. In the interest of adequate disclosure in this case, Georgia Power should review and, if necessary, revise its previous response in light of the new definition of terms. If Georgia Power believes there is more than one reasonable way to define these terms, then it may use additional definitions, each followed by a complete response.

V. Interrogatory 6

In this interrogatory, Intervenor requested detailed information concerning unsatisfactory dew point readings. Georgia Power appears to have provided a printout of work requested and performed on the air driers associated with the Plant Vogtle diesel generators. The proffered information was voluntarily provided to Intervenors on July 5, 1994.⁵ However, the proffered document (based on its description) may not relate to dew point readings.

We therefore shall order Georgia Power to provide to Intervenor what it asked.⁶ For each unsatisfactory⁷ dew point reading, Georgia Power should provide the date, time and dew point measured for each diesel. Georgia Power also should identify all corrective actions taken.

Instead of identifying every person who knew the dew point was less than satisfactory, Georgia Power may reveal which plant manager(s) and supervisor(s) were responsible for dew point readings, which people were assigned to take readings, and to which senior officials unsatisfactory readings were communicated, either as part of regular

⁵Answer at 9.

⁶If all the information is provided in the printout, then Georgia Power may choose to state that and it may be excused from other responses. It is not the Board's purpose to require additional paper to be filed unless it also provides additional information.

⁷Dew point readings that are hard to classify because they are marginal also should be identified and reported.

reports or as a special matter. Georgia Power is not excused from its responsibility to respond to an interrogatory because depositions were scheduled that could permit Intervenor to obtain the information in another way. Each party is free to select the forms of discovery it chooses to pursue. 10 CFR § 2.740(a).

VI. Interrogatory 7

In response to this part of Intervenors' motion, Georgia Power refers to its answer to Interrogatory 6. It is not clear, however, whether the "list of work requested and performed" will cover all instances where an Emergency Diesel Generator had an air drier out of service and the associated compressor(s) in service. If that information is included, then the response is complete.

With respect to the request to identify every person who knew this condition existed, Georgia Power may follow the guideline we established in our analysis of Interrogatory 6, in the last paragraph of Section V, above.

VII. Interrogatory 9

This discovery request relates to information that might be damaging to the credibility of Allen Mosbaugh. We agree with Georgia Power that it may properly retain information about credibility for use in cross-examination.

It is not required to disclose the opinions it has formed in preparing its case.⁶ Nor is it required to give up the possibility of surprise as part of its cross-examination techniques. This is an area where the work product privilege is particularly persuasive. 10 CFR § 2.740(b)(3). What an attorney does to undermine the credibility of an opposing witness is at the heart of his function in bringing out the truth.

We also have noticed that Georgia Power has revealed substantial information about its views about Mr. Mosbaugh's credibility. For example, Georgia Power has responded to the request for admissions covering the Office of Investigations Report (Case No. 2-90-020R). In these responses, Georgia Power has taken specific issue with some of the matters raised with the Office of Investigations by Mr. Mosbaugh.

VIII. Interrogatory 15

This interrogatory requests information contained in any investigation of Allen Mosbaugh that may have been conducted by Georgia Power. We interpret Georgia Power's response to state that only two kinds of investigations have

⁶Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1159 (1982), citing United States v. Nobles, 422 U.S. 225, 238-39 (1975); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-50, 20 NRC 1464, 1473 (1984), citing Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 864 (D.C. Cir. 1980).

been conducted: (1) historically conducted background checks, and (2) investigations conducted by counsel in the course of preparation for litigation.⁹ With respect to the first type of investigation, Georgia Power has stated that it is willing to disclose the results.¹⁰ With respect to the second type of investigation, Georgia Power claims the attorney's work product privilege. Because these investigations relate to the credibility of the Intervenor, we sustain that claim for the same reason that we gave in Section VII, above.

However, intervenor now makes a lesser request: that it be told the "extent, purpose and methods" used to gather personal information about him.¹¹ We sustain this request. Georgia Power apparently has gathered information about Mr. Mosbaugh for use at trial. If it introduces any of that information at trial, inquiry into extent, purpose and methods would be a legitimate way to attack the evidence. After all, most of us are fallible human beings and an extensive-enough investigation likely would expose some of

⁹If there are any other kinds of investigation, including investigations commenced before Georgia Power knew that litigation with Mr. Mosbaugh was likely, then Georgia Power should disclose the existence of those investigations and should respond to the interrogatories.

¹⁰Answer at p. 14, footnote 11.

¹¹Answer at 8.

our foibles.¹² Consequently, we shall direct Georgia Power to inform Intervenor about the extent, purpose and methods used to gather personal information about him.

ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is this 14th day of July, 1994, ORDERED, that:

1. "Intervenor's Motion to Complete Responses to Intervenor's Third Set of Interrogatory Questions and Document Request," June 22, 1994, is granted, to the extent that Georgia Power Company (Georgia Power) shall:

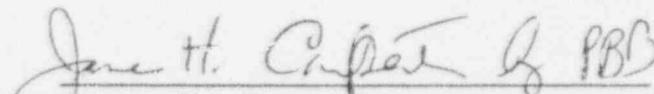
- a. disclose, based on knowledge and belief, the names of any nonspeaking witnesses to the telephone conference call of April 19, 1990, between the Vogtle site and corporate offices.
- b. file a fresh response to Interrogatory and Document Request No. 3, using the definitions referenced by Intervenor in his motion at 4.
- c. respond to Interrogatory 6, providing a list of unsatisfactory dew point readings. For each listed reading, Georgia Power shall provide the date, time and dew point measured for each diesel. It should also identify and describe the corrective action taken, if any.

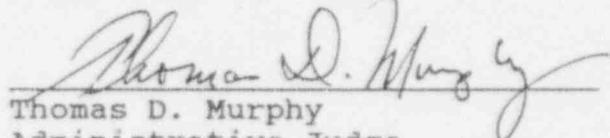
¹²We do not now rule on whether introduction of some facts gathered in an investigation would permit Intervenor to discover the content of the entire investigation, with possible expurgation of the opinions of attorneys. We suggest, however, that the parties consider this possibility and plan ahead so that the hearing need not be needlessly interrupted for Intervenor to study reports of investigations. Georgia Power might consider disclosing voluntarily information that does not contain attorney opinions and that is not likely to be useful in the tactic of surprise cross-examination.

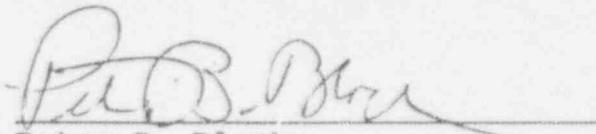
- d. reveal which plant manager(s) and supervisor(s) were responsible for dew point readings (during the time period covered in Interrogatory 6), which people were assigned to take readings, and to which senior officials unsatisfactory readings were communicated, either as part of regular reports or as a special matter.
- e. review the accompanying Memorandum section and complete its response to Interrogatory 7.
- f. inform Intervenor about the extent, purpose and methods used to gather personal information about him.

2. The parties shall review the Memorandum portion of this Memorandum and Order and shall file additional documents that may be necessary in light of the Board's comments.

FOR THE ATOMIC SAFETY AND LICENSING BOARD


James H. Carpenter
Administrative Judge


Thomas D. Murphy
Administrative Judge


Peter B. Bloch
Chair

Rockville, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

GEORGIA POWER COMPANY, ET AL.

(Vogtle Electric Generating Plant,
Units 1 and 2)

Docket No.(s) 50-424/425-OLA-3

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O (MOTION TO COMPEL) 7/14 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Docket No.(s)50-424/425-OLA-3
LB M&O (MOTION TO COMPEL) 7/14

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V. President Nuclear, Vogtle Project
Georgia Power Company
Post Office Box 1295
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Dated at Rockville, Md. this
15 day of July 1994


Office of the Secretary of the Commission