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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Board

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

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

GEORGIA POWER COMPANY'S ANSWER TO  
INTERVENOR'S MOTION TO COMPLETE RESPONSES TO INTERVENOR'S  
THIRD SET OF INTERROGATORY QUESTIONS AND DOCUMENT REQUEST

I. Introduction

Georgia Power Company ("GPC") hereby answers "Intervenor's motion to Complete (sic) Responses to Intervenor's Third Set of Interrogatory Questions and Document Request" (hereinafter "Motion"), which Intervenor Allen L. Mosbaugh filed on June 22, 1994. Intervenor's motion, which GPC construes as a motion to compel, lacks merit and should be denied.

Intervenor's motion relates to "Intervenor's Third Set of Interrogatories and Request for Production of Documents to Georgia Power, served on May 17, 1994" (hereinafter "Third Discovery Request"). GPC provided a forty-five page response on June 10, and made available certain requested documents. See Georgia Power Company's Response to Allen L. Mosbaugh's Third Set of Interrogatories (June 10, 1994) (hereinafter "Response").

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We met with Intervenor's counsel on July 1 to discuss Intervenor's Motion. We were unable, however, to assuage any of Intervenor's concerns.

## II. Discussion

### Interrogatory and Document Request No. 1

Intervenor's Interrogatory and Document Request No. 1 to GPC<sup>1/</sup> asked GPC to identify every tape transcript in the control of GPC or its counsel that were compiled from any tape recording prepared by Allen Mosbaugh, and requested that GPC produce a copy of all transcripts not previously produced to Intervenor. Although transcripts have been produced of all tapes determined to be relevant to the diesel generator issue, and Intervenor has previously expressed satisfaction with that production, Intervenor now claims that all tapes are relevant to this proceeding because "[t]he tapes form a complete documentary picture of the events occurring during the site area emergency as well as GPC's response to the emergency." Motion at 2.

Intervenor's argument flies in the face of the Board's June 2, 1994 Memorandum and Order (Scope of Discovery). Responding to GPC's concern over prior discovery requests pertaining to the site area emergency in general, the Board ruled that Intervenor's contention relates to the representations concerning diesel generator reliability. The Board stated that Intervenor "may expect

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<sup>1/</sup> Intervenor's Third Discovery Request at 11. Intervenor's Third Discovery Request also included interrogatories to named persons.

answers to questions directed to discovering what different individuals learned during the site area emergency, providing that the answers may be expected to relate directly or indirectly to whether Georgia Power told the whole truth to the NRC about its diesel generators." Id. at 5. Since GPC and the NRC Staff have previously produced the transcripts which relate to whether GPC told the truth about the diesel generators, Intervenor's demand for tapes unrelated to the diesel generator issue is simply discovery beyond the bounds of this proceeding.

Intervenor ignores the prior discovery in this case, and it likewise ignores GPC's work product claims.<sup>2/</sup> Intervenor first requested identification and production of documents transcribing Mr. Mosbaugh's tapes more than a year ago.<sup>3/</sup> At that time, GPC had in its possession copies of 201 tapes that had been released by the NRC Staff as not pertaining to its investigation. GPC's counsel had reviewed these tapes and made their own transcripts of selected portions of some tapes which counsel determined relevant to various proceedings. In response to Intervenor's request, GPC identified all the transcripts that had been made by counsel, and voluntarily produced forty-nine, that appeared to have some relevance to the factual bases of Intervenor's

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<sup>2/</sup> As has been the practice of the parties in this proceeding, GPC's Response included a general objection to production of attorney work-product material. See GPC's Response at 3-4.

<sup>3/</sup> Intervenor's First Request for Production of Documents by Georgia Power Company (May 4, 1993) (Document Request No. 42); Allen Mosbaugh's First set of Interrogatories to Georgia Power Company (May 4, 1993) (Interrogatory No. 5).

contention (i.e., diesel generator "start count" reporting). GPC objected to producing the remaining transcripts unrelated to the factual bases of Intervenor's contention and also generally objected to production of attorney work product material. See Georgia Power Company's Response to Allen L. Mosbaugh's First Set of Interrogatories (June 2, 1993) at 3-6, 11-14; Georgia Power Company's Response to Intervenor's First Request for Production of Documents (June 2, 1993) at 2-5, 32-34.

Intervenor did not object to GPC's response at the time. However, in March 1994, long after the period in which a motion to compel might be filed, Intervenor informed GPC that it planned to file a motion to compel GPC to produce all transcripts of those portions of the 201 tapes selected by counsel in its representation. To address Intervenor's concern, GPC reviewed its transcripts again and produced an additional eight which might be considered relevant.<sup>4</sup> See letter from J. Lamberski to M. Kohn (March 7, 1994), attached. GPC specifically noted that in producing these tapes, it was not waiving its prior objections, including the claim of work product privilege with respect to the remaining tape transcripts. GPC believed that Intervenor was satisfied.

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<sup>4</sup> In response to Intervenor's Third Discovery Request, and in view of the Licensing Board's June 2, 1994 Memorandum and Order providing additional guidance on the scope of discovery, GPC again reviewed the tape transcripts and produced two additional transcripts which contained conversations related to the "air quality" of the diesel generator's control air system. See Response at 34.

Two months later, however, Intervenor filed a "Motion to Compel Tape Transcripts" (May 2, 1994). After discussions, which included reminding Intervenor of GPC's prior voluntary production, Intervenor then voluntarily withdrew his motion to compel. Intervenor stated:

Because the tape transcripts are relevant to the phase II<sup>2/</sup> issues, there would appear to be no need to request these documents during this phase of the proceeding.

Intervenor's Statement of Good Cause to File Interrogatory Questions Concerning Illegal Transfer and to Convene Depositions Concerning Illegal Transfer of Control (May 6, 1994) at 11.

In sum, Intervenor has admitted that the tape transcripts are irrelevant to this phase of this proceeding. Intervenor has also made no showing why GPC's attorney work product should be invaded. Further, Intervenor has the original tapes and thus is perfectly able to review their contents if it is believed that other relevant material is contained on them. GPC counsel's transcripts are simply not needed.

Interrogatory and Document Request No. 2

Intervenor's Interrogatory and Document Request No. 2 asked GPC to "identify everyone known to GPC/Southern Nuclear that was a party to any portion of the 4-19-90 afternoon telephone conference call between the site and corporate offices for which there is a partial transcript of the conference call in NRC Tape

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<sup>2/</sup> GPC assumes that the reference to "phase II" means the second of the two phases discussed in the Board's Memorandum and Order (Case Management), LBP-93-15, dated July 21, 1993, at 3.

Transcript No. 58, between page 8, line 7, and page 17, line 11." In addition, it stated, "For each person identified above, state the location (including city, building and office or each person during the call)."<sup>9</sup> While noting that Intervenor was as capable as GPC of identifying this information, GPC nevertheless responded by identifying the location of each person known to have been a participant in the call. Response at 34.

Intervenor now asserts that "GPC's response is totally deficient" for several reasons. First, Intervenor asserts that GPC "fails to identify the persons on the call whose voices are not heard" and "fails to provide information learned by GPC about the location and participation of individuals that is not contained in the tape transcript." Motion at 2. GPC's response identified those persons known to GPC to have been a party to that call. 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.

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<sup>9</sup> Intervenor's Third Discovery Request at 11-12.

Interrogatory and Document Request No. 3

Intervenor's Interrogatory and Document Request No. 3 asked GPC to identify whether any problem or failure occurred with respect to twenty-one diesel generator starts, and with respect to each, to provide the "primary cause," "secondary cause," "root cause," and "common cause." Third Discovery Request at 12. GPC objected to the extent that the interrogatory requested GPC to engage in new analyses, but nevertheless identified the cause of the problem or failure among the listed starts. Response at 34-37.

Intervenor asserts that GPC's response "is troubling inasmuch it appears to concede that GPC never provided a root cause analysis with respect to diesel generator failures." Motion at 3. GPC made no such concession. GPC objected because it had not attempted to classify causes associated with starts, a number of which were part of troubleshooting, as "primary, secondary, root, or common."<sup>2/</sup> GPC then stated the causes that it had identified, grouping those starts that shared a common cause. GPC also referred Intervenor to NUREG-1410 and the Wyle Test Report, which had been previously provided and provides further information on the causes of problems. Thus, GPC believes its response is complete.

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<sup>2/</sup> A party is not required to perform additional analysis to respond to an opponent's discovery request. See 10 C.F.R. § 2.740(b)(3); Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 N.R.C. 317, 334 (1980).

Interrogatory and Document Request No. 4.

Intervenor's Interrogatory and Document Request No. 4 asked GPC to state the start numbers when diesel generators 1A and 1B "came out of maintenance overhaul," were "returned to service," and were "declared operable," and that "constitute 'post-maintenance starts'" during the 1990 refueling outage. Motion at 4. Noting that different persons may apply different connotations to the quoted terms, GPC objected to the discovery request as vague because of Intervenor's failure to identify the context. Response at 37. GPC nevertheless proceeded to identify the start number associated with each term as GPC interpreted it.

Intervenor now states that "GPC refused to respond on the assertion that Intervenor 'fails to reference the source of the quoted language.'" Intervenor's statement is false. Despite the vagueness of Intervenor's discovery request, GPC responded fully. Intervenor's Interrogatory and Document Request Nos. 6 and 7

Intervenor's Interrogatory No. 6 asked GPC to provide certain information on air quality and dew point measurements taken for the diesel generators between 1989 and 1990, including identification of "every person who knew the dewpoint was less than satisfactory." Third Discovery Request at 13-14. Intervenor's Interrogatory No. 7 asked GPC to identify each occasion when the air driers were out of service and "identify every person who knew this condition existed." GPC responded to these two requests by making available a print-out summarizing the relevant work history, but objected to the requests as unduly burdensome

to the extent they requested identification of "every person" who may have known of these conditions. Response at 38.

Without citing any authority, Intervenor now asserts that "production in lieu of responding to interrogatory responses requires that the documents be provided to Intervenor as part of the response and not made available in Atlanta." Motion at 5. To resolve this dispute, GPC hand-delivered a copy of the print-out to Intervenor's counsel on July 5, 1994. See Georgia Power Company's Second Supplemental Response to Allen M. Mosbaugh's Third Set of Interrogatories and Request for Documents (July 5, 1994).

Intervenor also argues that it has a right to know which members of GPC/Southern Nuclear management knew of the unacceptable dewpoints and air driers being out of service. Motion at 5, 6. Intervenor did not ask this question. Instead, its request was far broader and unreasonable, demanding that GPC attempt to identify anyone--including, presumably, maintenance workers, foremen, work-planners and schedulers, secretary and administrative personnel, equipment operators, and the like--who may have been aware of any unsatisfactory dew point measurements or air driers being out of service over a two year period.<sup>8</sup>

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<sup>8</sup> GPC pointed out that, like other plants, the process at Plant Vogtle associated with requesting work to be performed, obtaining parts, material and tools for work performed; taking equipment out of service; performing work; reviewing work performed; closing out work authorization packages; and periodically reporting on work accomplished necessarily involves numerous people. Response at 38-39.

Intervenor appears to acknowledge that its request was unduly burdensome, arguing "GPC was free to limit the scope and respond so as not to be overly burdensome." Motion at 5. Although GPC endeavors to respond even when requests are objectionable, it is not required to rewrite Intervenor's requests or to divine what lesser scope of information is of real interest to Intervenor.

Intervenor has scheduled extensive depositions, including depositions of managers involved in preparing the April 9, 1990 letter to NRC (in which the disputed statement concerning air quality was made). Thus, Intervenor will be able to ask the pertinent individuals, including management, whether they were aware of dew point measurements or air driers being out of service. In light of this opportunity, there is little reason to rewrite Intervenor's overreaching questions.

Intervenor's Interrogatory and Document Request No. 9

Intervenor's Interrogatory 9 asked GPC to identify every specific fact which it believes could adversely affect a determination of the credibility of Allen Mosbaugh. Third Discovery Request at 15. GPC objected to Interrogatory 9 as burdensome and seeking attorney work product material, i.e. the mental impressions and legal strategy of GPC's counsel. Response at 42.

GPC's counsel has not assembled any document cataloging all the facts that may affect Mr. Mosbaugh's credibility, but it has noted during this proceeding inaccurate or inconsistent statements by Mr. Mosbaugh in his written allegations and pleadings, as well as questionable positions and tactics. In some cases,

GPC's counsel has made inquiries, in preparation for litigation in this proceeding and through privileged communications, to confirm inaccuracies in Mr. Mosbaugh's representations. GPC's counsel may confront Mr. Mosbaugh with such inaccuracies and inconsistencies during cross-examination, and is counting in part on the element of surprise to obtain candid and unrehearsed responses from Mr. Mosbaugh. Premature disclosure of GPC's counsel's thoughts and theories may frustrate our ability to challenge Mr. Mosbaugh's credibility and recollection.

Intervenor does not meaningfully address GPC's work product claim. With respect to Interrogatory 9, Intervenor states that it merely "requests all facts that could be used and it does not require Licensee's counsel to specify which facts it will eventually rely upon." Motion at 7. This distinction is meaningless. The reality is that Intervenor wants GPC to parse Mr. Mosbaugh's prior statements<sup>2/</sup> and identify inaccuracies and inconsistencies for the purpose of preventing GPC from conducting effective cross-examination.

The NRC's Rules of Practice require protection against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding. 10 C.F.R. 2.740(b)(3). The rules do

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<sup>2/</sup> As pointed out in GPC's Response, at 42, Intervenor possesses Mr. Mosbaugh's prior testimony and thus already has the factual information he seeks. Intervenor and his counsel can review these statements themselves to identify the inaccuracies and inconsistencies.

not permit, under any circumstances, interrogatories seeking to require counsel to disclose mental impressions, conclusions and opinions regarding the credibility of an opposing witness.

The NRC's work-product rule is adapted from Fed. R. Civ. P. 26(b)(3) and adopts the Federal civil standards. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LSP-82-82, 16 N.R.C. 1144, 1159 (1982). "At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area in which he can analyze and prepare his client's case." Id., quoting United States v. Nobles, 422 U.S. 225, 238-39 (1975). "It provides a 'zone of privacy' within which attorneys may weigh the merits of their case and determine a litigation plan from which to proceed." Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-50, 20 N.R.C. 1464, 1473 (1984), citing Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 864 (D.C. Cir. 1980).

In applying this doctrine, a distinction is often made between "ordinary" and "opinion" work product. While ordinary work product (that which does not include the mental impressions, conclusions and legal theories of the attorney or other agent) may be obtained by an adverse party upon a showing of "substantial need" and inability without undue hardship to obtain the substantial equivalent of the materials by other means, "opinion work product" is not discoverable, so long as the material was in fact prepared by an attorney or other agent in anticipation of litigation (and not assembled in the ordinary course of business

or pursuant to public requirements unrelated to litigation).

Shoreham, LBP-82-82, 16 N.R.C. at 1162.<sup>19</sup>

[I]t is clear that opinion work product is entitled to substantially greater protection than ordinary work product. Therefore, unlike ordinary work product, opinion work product can not (sic) be discovered upon a showing of substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship. See Fed. R. Civ. P. 26(b)(3). In our view, opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances. See Hickman v. Taylor, [329 U.S. at 511].

Id. at 1160, quoting In re Murphy, 560 F.2d 326, 336 (8th Cir. 1977) (footnotes omitted). See also In re Grand Jury Investigation, 599 F.2d. 1224, 1231 (3d Cir. 1979).

The information which Intervenor seeks is clearly opinion work product. Intervenor in effect seeks to have GPC's counsel identify those aspects of Mr. Mosbaugh's prior statements and testimony that make it, in GPC's counsel's view, susceptible to challenge. Intervenor's counsel has Mr. Mosbaugh's prior statements and is capable of reviewing that material to identify its weaknesses. There is simply no justification for Intervenor's demand that GPC's attorneys disclose their thought processes and theories.

Intervenor's Interrogatory and Document Request No. 15

Interrogatory No. 15 asked GPC whether Intervenor has ever been subjected to any form of investigation by GPC or its counsel. Third Discovery Request at 16-17. Like its response to

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<sup>19</sup> But see Comanche Peak, LBP-84-50, 20 N.R.C. at 1474.

Interrogatory 9, GPC objected to interrogatory 15 to the extent it applies to production of information and documents that are subject to the attorney client and attorney work product doctrines. GPC did note that GPC had performed background investigations of all employees, including Intervenor, as part of the plant access requirements imposed by the NRC's regulations (Response at 44), for which GPC did not claim work product protection.<sup>11/</sup>

Intervenor does not meaningfully address GPC's work product claim or, as required by precedent, make a showing of exceptional need. As stated previously in this Answer, GPC's counsel has made inquiries, in confidential attorney-client communications and other work product investigations, to assess the accuracy of Mr. Mosbaugh's factual representations. Mr. Mosbaugh has made numerous allegations, dating back to 1990, and counsel's privileged assessment of these matters has been an essential part of its preparation for litigation. Intervenor seeks to invade and disrupt this very fundamental aspect of counsel's representation of GPC.

An example is counsel's inquiry into Mr. Mosbaugh's representations in his December 9, 1992 Amended Petition to Intervene. The results of this inquiry, disclosed in GPC's December 22, 1992

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<sup>11/</sup> GPC has indicated that it does not view the background investigations, conducted when Mr. Mosbaugh was an employee to grant plant access, as relevant to this proceeding, but is willing to produce them if Intervenor so desires. Georgia Power Company's Second Supplemental Response to Allen M. Mosbaugh's Third Set of Interrogatories and Request for Documents (July 5, 1994) at 2.

Answer, revealed that Mr. Mosbaugh made inaccurate or incomplete statements concerning where he had voted and where his family resided and worked. Other inquiries by counsel or counsel's agents<sup>12</sup> that have not been revealed retain their protected status.

Intervenor also states, "GPC implies that its investigations of Mr. Mosbaugh consist of the 'historically conducted background investigations' required by NRC regulations" and accuses GPC of being misleading. Motion at 7. In its response GPC did not characterize privileged communications and inquiries as background investigations associated with NRC operations. A straightforward reading of the response shows GPC merely disclosed those non-privileged background checks that were conducted by GPC for Mr. Mosbaugh's access to the site and that have no relationship to counsel's inquiries.

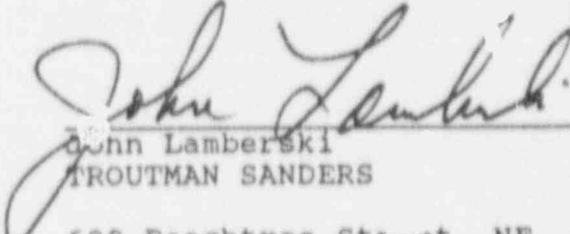
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<sup>12</sup> Inquiries by agents are also shielded by the work product doctrine. United States v. Nobles, 422 U.S. at 238-39.

III. Conclusion

For the reasons stated above, Intervenor's Motion should be denied.

Respectfully submitted,

  
John Lamberski  
TROUTMAN SANDERS

600 Peachtree Street, NE  
Suite 5200  
Atlanta, GA 30308-2216

(404) 885 3360

Ernest L. Blake, Jr.  
David R. Lewis

SHAW PITTMAN POTTS & TROWBRIDGE  
2300 N Street, N.W.  
Washington, D.C. 20037

(202) 663 8000

Counsel for Georgia Power Company

Dated: July 7, 1994

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USNRC

Before the Atomic Safety and Licensing Board

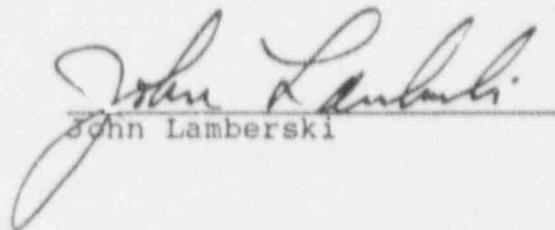
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In the Matter of	)	Docket Nos. 50-424-OLA-3
	)	50-425-OLA-3
GEORGIA POWER COMPANY,	)	
et al.	)	Re: License Amendment
	)	(Transfer to Southern
(Vogtle Electric Generating	)	Nuclear)
Plant, Units 1 and 2)	)	
	)	ASLBP No. 93-671-01-OLA-3

OFFICE OF SECRETARY  
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Georgia Power Company's Answer to Intervenor's Motion to Complete Responses to Intervenor's Third Set of Interrogatory Questions and Document Request," dated July 7, 1994, were served by express mail upon the persons listed on the attached service list, this 7th day of July, 1994.

  
John Lamberski

Dated: July 7, 1994

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

SERVICE LIST

Administrative Judge Peter B. Bloch, Chairman Atomic Safety & Licensing Board U.S. Nuclear Regulatory Commission Washington, D.C. 20555	Office of the Secretary U.S. Nuclear Regulatory Commission Washington, D.C. 20555 ATTN: Docketing and Services Branch
Administrative Judge James H. Carpenter Atomic Safety & Licensing Board 933 Green Point Drive Oyster Point Sunset Beach, N.C. 28468	Mitzi A. Young, Esq. Charles Barth, Esq. Office of General Counsel One White Flint North Stop 15B18 U.S. Nuclear Regulatory Commission Washington, D.C. 20555
Administrative Judge Thomas D. Murphy Atomic Safety & Licensing Board U.S. Nuclear Regulatory Commission Washington, D.C. 20555	Director, Environmental Protection Division Department of Natural Resources 205 Butler Street, S.E. Suite 1252 Atlanta, Georgia 30334
Michael D. Kohn, Esq. Kohn, Kohn & Colapinto, P.C. 517 Florida Avenue, N.W. Washington, D.C. 20001	Office of Commission Appellate Adjudication U.S. Nuclear Regulatory Commission Washington, D.C. 20555
Stewart A. Ebnetter Regional Administrator USNRC, Region II 101 Marietta Street, NW Suite 2900 Atlanta, Georgia 30303	Adjudicatory File Atomic Safety and Licensing Board U.S. Nuclear Regulatory Commission Washington, D.C. 20555

TROUTMAN SANDERS  
ATTORNEYS AT LAW  
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

NATIONSBANK PLAZA  
600 PEACHTREE STREET, N.E. SUITE 5200  
ATLANTA, GEORGIA 30308-2216  
TELEPHONE 404-885-3000  
FACSIMILE 404-885-3900

JOHN LAMBERSKI

DIRECT 404-885-3360

March 7, 1994

VIA AIRBORNE EXPRESS

Michael D. Kohn, Esquire  
Kohn, Kohn & Colapinto, P.C.  
517 Florida Avenue, N.W.  
Washington, D.C. 20001

Re: Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2)  
NRC Docket Nos. 50-424-OLA-3, 50-425-OLA-3; License Amendment for  
Transfer to Southern Nuclear Operating Company

Dear Michael:

Last Thursday you informed me that Intervenor planned to file a motion to compel Georgia Power Company ("GPC") to produce all transcripts which GPC has prepared of 201 of Mr. Mosbaugh's tapes. (Those 201 tapes are the tapes which the NRC determined, in February, 1991, were not relevant to its investigation of GPC's statements to NRC concerning diesel starts and which, as a result, the NRC returned to Mr. Mosbaugh. Mr. Mosbaugh then made those 201 tapes available to GPC for copying in October, 1991, in connection with the Mosbaugh v. GPC DOL proceeding. Intervenor retains the originals of those 201 tapes to this day.) I informed you that I thought GPC had produced to Intervenor in this case all the transcripts of those 201 tapes which were relevant to the issues in this case (i.e., the diesel starts issue and the illegal license transfer issue). However, I promised to review our records and provide you a response today.

In June, 1993, in response to Intervenor's First Request for Production of Documents, dated May 4, 1993, GPC stated a number of objections, including that certain requests "(1) are overbroad as requesting information not relevant to the Factual Bases, as hereinafter defined, (2) are oppressive, (3) are unduly burdensome, or (4) seek documents subject to the attorney-client communication privilege or the attorney work product doctrine." Georgia Power Company's Response to Intervenor's First Request for Production of Documents, dated June 2, 1993, at p. 1. Nonetheless, without waiving any objections, in response to document request no. 42, GPC made available to Intervenor transcripts of portions of approximately 50 tapes. Id. at 32-34.

I have again reviewed transcripts of those portions of the 201 tapes which GPC prepared and which I believed might be relevant to the issues in this case. I have concluded that there are eight additional transcripts (Tape nos. 25, 28, 30, 34, 35, 39, 50 and 231)

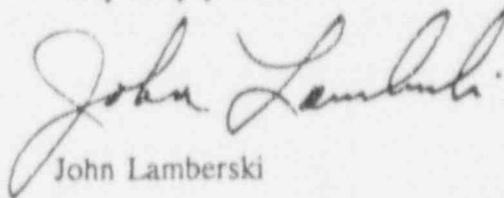
Michael D. Kohn, Esquire

March 7, 1994

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which are relevant to the issues in this case. Without waiving previous objections, GPC is voluntarily producing those eight transcripts to Intervenor. For your convenience, copies of those transcripts are enclosed.

Very truly yours,

A handwritten signature in cursive script that reads "John Lamberski". The signature is written in dark ink and is positioned above the printed name.

John Lamberski

xc: Charles A. Barth, Esq.