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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commissioners

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

GEORGIA POWER COMPANY'S MOTION FOR STAY OF LICENSING BOARD ORDER REQUIRING PRODUCTION OF ATTORNEY NOTES OF PRIVILEGED COMMUNICATIONS

Introduction

Pursuant to 10 C.F.R. § 2.788, Georgia Power Company ("Georgia Power") hereby moves the Commission for a stay, pending appellate review, of an order issued by the Atomic Safety and Licensing Board in the above-captioned proceeding requiring production of certain attorney notes of confidential and privileged attorney-client communications. This stay is necessary to preserve the status quo ante during appellate review and to prevent the destruction of the attorney-client privilege during the pendency of such review.

The Licensing Board has issued a temporary stay of its order until September 15, in order to allow Georgia Power to seek a stay and appellate review from the Commission. Tr. 13315-20. Georgia Power therefore requests that the Commission act on this motion and issue the stay by September 15, 1995. Georgia Power also intends to file its petition for review by this date.

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A stay is appropriate under the standards set forth in section 2.788. The Licensing Board's order is clearly erroneous. Indeed, it declines to follow the law established by the Supreme Court in Upjohn v. United States, 449 U.S. 383 (1981). Thus, there is an extremely strong likelihood that Georgia Power will succeed on the merits. Further, if a stay is not granted, Georgia Power will be required to disclose its attorney notes. Such action will irreparably injure Georgia Power by destroying the confidentiality and privilege of the attorney-client communications recorded in these notes. Conversely, no other party will be injured, because they have already had full opportunity to discover the facts relevant to this case through examination, at deposition and at hearing, of the persons with direct knowledge of the facts at issue. Finally, issuing the stay would serve the public interest in preserving the confidentiality of attorney-client communications, thereby allowing full, frank discussions between licensees and their counsel and the informed legal decisions that result.

Summary of the Decision Requested to be Stayed

The order which Georgia Power asks be stayed was issued orally on the record by the Atomic Safety and Licensing Board on September 6, 1995. Tr. 13154-58 (Sept. 6, 1995). The Licensing Board's decision requires Georgia Power to produce notes taken by Georgia Power's attorney, Mr. John Lamberski of the Troutman Sanders law firm, reflecting communications with a Georgia Power employee, Ester Dixon (hereinafter the "Dixon notes").

Ms. Dixon is a secretary employed by Georgia Power at Plant Vogtle. In April 1990, she typed certain slides that were used in Georgia Power's April 9, 1990 presentation to the NRC (concerning restart of Vogtle Unit 1 after the March 20, 1990 site area emergency). She also

typed a list of diesel generator starts that had been compiled by the Vogtle Unit Superintendent, Mr. Jimmy Paul Cash, in connection with diesel start information presented in the slides. The accuracy of the diesel start information presented on April 9, 1990 has been the subject of an NRC Office of Investigations ("OI") investigation and Department of Justice inquiry prompted by allegations submitted by Allen Mosbaugh (the Intervenor in this proceeding) in 1990, as well as a 2.206 petition filed by Intervenor in 1990, and is now at issue in this case.

The notes at issue were taken by Georgia Power's counsel, Mr. Lamberski, in 1992 while investigating events associated with the OI and Department of Justice inquiries. Tr. 4416 (May 16, 1995). Ms. Dixon was deposed by Intervenor in this proceeding on July 20, 1994, and she testified and was cross-examined by Intervenor's counsel in this proceeding on June 9, 1995. Tr. 8089-8176 (June 9, 1995).

Following Ms. Dixon's testimony in this proceeding, Intervenor moved to compel production of the Dixon notes.[1] Intervenor argued that he needed the notes to resolves differences in Ms Dixon's recollection between the 1994 deposition and the 1995 testimony.[2] Georgia Power responded asserting that the notes are attorney-client communications and attorney work product.[3] On August 3, 1995, the Licensing Board ruled that Ms. Dixon's communications were

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[1] Intervenor's Motion to Compel Production of Licensee's Notes of Interview of Ester Dixon (June 30, 1995).

[2] The difference in Ms. Dixon's testimony at her deposition and at the hearing was due to her personal efforts to prepare for the hearing, including her review of contemporaneous records, such as her time sheet, and recollection of other events which placed the preparation of Mr. Cash's list in sharper focus. Tr. 8084, 8102, 8126. At the hearing, Intervenor's counsel developed the chronology of Ms. Dixon's activities by reference to her time sheet. Tr. 8098-8120. In her deposition, in contrast, Intervenor's counsel used no documents, or otherwise questioned the witness, to assist her in recalling the historic sequence of events.

[3] Georgia Power Company's Response to Intervenor's Motion to Compel Production of Licensee's Notes of Inter-

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privileged communications of a client to an attorney, but ordered an *in camera* inspection of the notes to determine whether application of the privilege would further its underlying purposes.[4]

On August 8, 1995, Georgia Power moved for reconsideration of the Licensing Board's August 3, 1995 Memorandum and Order, to the extent it suggested that the attorney-client privilege might be outweighed by a showing of need.[5] On August 10, the Licensing Board acknowledged that the attorney-client privilege is absolute when it attaches, but requested further briefing on the standards set out in the Upjohn case. Tr. 10820-21 (Aug. 10, 1995). Intervenor and Georgia Power responded on August 15, 1995 and on August 18, 1995, respectively.[6]

On September 5, 1995, the Licensing Board stated that it was denying Georgia Power Company's Motion for Reconsideration. Tr. 12942 (Sept. 5, 1995). In explanation, the Board opined that Ms. Dixon was involved in a situation in which her interest in confidentiality was at a minimum; that she was close to being a third party; and that there was no personal interest of hers in being protected for confidentiality. Tr. 12942-43 (Sept. 5, 1995). Following an *in camera* inspection of the notes on September 6 (see Tr. 13,078[7]), the Board concluded that there was no material that required protection as "attorney work product" and ordered release of the notes. Tr.

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view of Ester Dixon (July 17, 1995). "The attorney-client privilege, if and when attached to a communication (and excepting, of course a valid waiver), is absolute, and there is no 'balance' to be 'tested,' and no 'needs' test, as might be the case with a qualified privilege." Arcuri v. Trump Taj Mahal Associates, 154 F.R.D. 97, 105 (D.N.J. 1994).

[4] Memorandum and Order (Request for Discovery Concerning Ester Dixon), LBP-95-15, slip op. (Aug. 3, 1995).

[5] Georgia Power Company's Motion for Reconsideration of Order Regarding Request for Discovery Concerning Ester Dixon (August 8, 1995).

[6] Response to Licensee's Motion for Reconsideration Regarding the Notes of the Ester Dixon Notes and Brief on Attorney Client Privilege (Aug. 15, 1995); Georgia Power Company' Memorandum of Law on the Attorney Client Privilege (Aug. 18, 1995).

[7] The transcript incorrectly states that the documents were received in evidence. They were not.

13154 (Sept. 6, 1995). The Board later added that it recognized it was placing a "limitation" on a Supreme Court doctrine of attorney-client privilege. Id. at 13157. The next day, when Georgia Power communicated its decision to seek appellate review, the Board suggested that the question was whether communications between an attorney and an employee with no personal interest should still be considered exempt [i.e. privileged] under the Upjohn doctrine. Tr. 13319-20.

Grounds for the Stay

The granting of a stay is governed by the four factors set forth in section 2.788(e) of the NRC's rules. These factors are the same as those traditionally applied by the courts. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 N.R.C. 219, 257 (1990). Each of these factors, discussed in turn below, strongly militates toward the granting of a stay.

Georgia Power is Likely to Prevail on the Merits

Georgia Power submits that it is very likely to prevail on the merits. Because the Licensing Board's order is inconsistent with controlling Supreme Court precedent, it is clearly erroneous.

In Upjohn, the Supreme Court held that the attorney-client privilege protects not only the giving of professional advice to those who can act on it but "also the giving of information to the lawyer to enable him to give sound and informed advice." 449 U.S. at 390. The Supreme Court recognized that the first step in the resolution of any legal problem is ascertaining the factual background, and that information will often be possessed by middle-level or lower-level

employees. Id. at 390-91. For this reason, the Supreme Court held that the attorney-client privilege applies to a communication between an attorney representing a corporation and an employee of that corporation even if the employee is not part of the "control group," provided certain criteria are met. 449 U.S. at 394-95.[8]

The Licensing Board's decision is simply at odds with this controlling Supreme Court precedent. The Board decided that the attorney-client privilege was inapplicable because Ms. Dixon did not have a personal interest in the controversy. But under Upjohn, the personal interest of an employee is irrelevant -- it is not one of the criteria articulated in Upjohn. Under Upjohn, an attorney-client privilege applies and attaches to allow and encourage the corporation's attorney to ascertain the facts so that the attorney may provide the best and most informed advice to the corporation, and not to serve the personal interest of employees who may possess those facts.

Georgia Power Will Be Irreparably Injured Unless a Stay is Granted

Of the four stay factors, the existence of irreparable injury is the most crucial. Seabrook, supra, CLI-90-3, 31 N.R.C. at 258. In the case at bar, if Georgia Power is required to produce its

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[8] The criteria are :

> The information is necessary to supply the basis for legal advice to the corporation or was ordered to be communicated by superior officers.
>
> The information was not available from "control group" management.
>
> The communications concerned matters within the scope of the employee's duties.
>
> The employee was aware she was being questioned in order for the corporation to obtain legal advice.
>
> The communications were considered confidential when made and kept confidential.

449 U.S. at 394-95. Satisfaction of these factors was addressed in the pleading below and was undisputed. See, e.g., Georgia Power Company's Motion for Reconsideration of Order Regarding Request for Discovery Concerning Ester Dixon (August 8, 1995) at 5-6.

attorney notes, the confidentiality and privilege of those notes will be destroyed. Such a destruction of the privilege constitutes irreparable injury *per se*. Once the confidentiality of the communications is lost, it cannot be restored.

> "Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable. . . . Once the documents are surrendered pursuant to the lower court's order, confidentiality will be lost for all time. The *status quo* could never be restored."

Providence Journal v. F.B.I., 595 F.2d 889, 890 (1st Cir. 1979), quoted in Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-83-6, 17 N.R.C. 333, 334 (1983). "The need for timely protection is particularly urgent where the discovery sought is . . . allegedly blanketed by the absolute attorney-client privilege." In re Von Bulow, 828 F.2d 94, 99 (2d Cir. 1987).[9/]

Georgia Power is also concerned that Intervenor will use the Board's ruling as a precedent to invade other privileged attorney-client communications. Intervenor has repeatedly sought to turn this proceeding into an attack on opposing counsel.[10/] If Intervenor succeeds in subverting the proceeding in this fashion, its completion could be delayed considerably.

[9/] See also Admiral Insurance Co. v. U.S. District Court for the District of Arizona, 881 F.2d 1486, 1491 (9th Cir. 1989) ("In view of the irreparable harm a party will likely suffer if erroneously required to disclose privileged materials or communications, courts have recognized the propriety of using mandamus for the review of orders compelling discovery in the face of assertions of absolute privilege."); U.S. Department of Energy v. Brimmer, 776 F.2d 1554, 1559 (Temp. Emer. Ct. of App. 1985) ("[O]nce the disclosure is made, the erroneous compulsory disclosure may, as a practical matter, be irremediable by the usual appellate process."). There is some minority view refusing interlocutory review of rulings on privilege on the theory that a new trial can always be ordered after appellate review of the final decision (Boughton v. Cotter Corp., 10 F.3d 746, 749 (10th Cir. 1993)), but such a remedy is not reasonable in this case, which is now three years old.

[10/] See, e.g., Intervenor's Motion to Compel Production of Affidavits in the Possession of Georgia Power Co. (July 23, 1993), denied, Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 & 2), LBP-93-18, 38 N.R.C. 121

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Granting a Stay Would Not Harm Other Parties

The granting of a stay will not harm any party. Even if the Commission were ultimately to decide that the notes should be produced and the Licensing Board were to decide that the notes provided grounds to recall Ms. Dixon (neither of these assumptions is realistic in Georgia Power's estimation), Ms. Dixon could be recalled without significantly delaying completion of this proceeding. There are still several weeks of hearing scheduled; and even after completion of testimony while findings and a decision are being prepared, the evidentiary record could be reopened to allow limited testimony with minimal or no impact on the ultimate schedule.

Even assuming a slight possibility of delay, that possibility should be outweighed by Intervenor's failure to develop the facts through proper means. Intervenor has had two opportunities to obtain those facts directly from Ms. Dixon: at her deposition and during her testimony at the Hearing. At any point during those two interrogations, Intervenor could have asked Ms. Dixon if her recollection of events surrounding the typing of the Cash List had changed since she had spoken with her attorneys, and if so, how it had changed. Intervenor could also have asked Georgia Power, in interrogatories, to describe Ms. Dixon's recollection of the Cash list.[11]

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(1993); Board Notification 94-07 (March 24, 1994) (allegations directed at counsel); Intervenor's Motion for Subpoena of James Joiner (Dec. 23, 1994); Tr. 10799-821 (attempted inquiry into counsel's role in preparing responses to requests for admissions); Tr. 11100 (attempted inquiry into counsel's role in preparing response to 2.206 petition); Tr. 11210-11 (attempted inquiry into attorney-client communications).

[11] Georgia Power has never sought to protect the facts or information in Ms. Dixon's possession. Georgia Power recognizes that such facts are not protected.

> What is protected by the attorney-client privilege is the client's communication with counsel. That particular communication is kept secret. The facts underlying the communication, however, do not become privileged. The discovering party may have access to those facts from any source except the attorney, since

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Intervenor, however, made no use of these opportunities. Since Intervenor has failed to pursue these legitimate means of discovery, he should not now be able to claim injury from Georgia Power's legitimate attempt to protect the confidentiality of its attorney-client communications.

The Public Interest Requires Issuance of the Stay

The attorney-client privilege serves a very important public interest -- to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice. Upjohn, 449 U.S. at 389, citing 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends on the lawyer's being fully informed by the client. Id.

The Supreme Court in Upjohn observed that if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. "An uncertain privilege, or one which purports to be certain but results in varying applications by the courts, is little better than no privilege at all." Id. at 393.

Requiring disclosure of the Dixon notes prior to appellate review is inconsistent with this strong public interest. Once destroyed, the confidentiality and protection of privileged

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that source of information is excluded by virtue of the privilege.

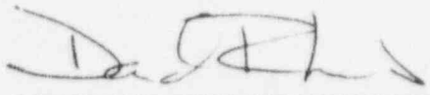
John William Gergacz, Attorney-Corporate Client Privilege 3-41-42 (2d ed. 1990); see also Upjohn, 449 U.S. at 395-96 (the protection of the privilege extends only to communications and not to facts). The facts, however, should be determined through the normal discovery process during the period assigned to discovery, and not by invasion of privileged communications. See Upjohn, 449 U.S. at 396.

communications cannot be restored. Even a temporary disclosure, or disclosure under a protective order, is damaging to the purposes served by the privilege. Such a precedent would cause attorneys and their clients to fear similar disclosures in other cases and would have a serious chilling affect on attorneys' abilities to make factual inquiries in order to advise their clients. It would create the sort of uncertainty Upjohn strongly advises against.

Conclusion

For all of the reasons stated above, the Commission should stay the Licensing Board's order on the Dixon notes to preserve Georgia Power's attorney-client privilege until that order has been reviewed.

Respectfully submitted,



Ernest L. Blake, Jr.
David R. Lewis

SHAW PITTMAN POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8474

James E. Joiner
John Lamberski

TROUTMAN SANDERS
Suite 5200
600 Peachtree Street, N.E.
Atlanta, GA 30308-2216
(404) 885 3360

Counsel for Georgia Power Company

Dated: September 11, 1995

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	)	(Transfer to Southern Nuclear)
(Vogtle Electric Generating Plant,	)	
Units 1 and 2)	)	ASLBP No. 93-671-01-OLA-3

CERTIFICATE OF SERVICE

I hereby certify that copies of "Georgia Power Company's Motion for Stay of Licensing Board Order Requiring Production of Attorney Notes of Privileged Communications," dated September 11, 1995, were served upon the persons listed on the attached service list by deposit in the U.S. Mail, first class, postage prepaid, or where indicated by an asterisk by hand delivery, this 11th day of September, 1995.

David R. Lewis
Counsel for Georgia Power Company

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SERVICE LIST

*Commissioner Shirley A. Jackson
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852

*Commissioner Kenneth C. Rogers
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852

Administrative Judge
Peter B. Bloch, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge
James H. Carpenter
Atomic Safety and Licensing Board
933 Green Point Drive
Oyster Point
Sunset Beach, N.C. 28468

Administrative Judge
James H. Carpenter
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Stewart D. Ebneter
Regional Administrator, Region II
U.S. Nuclear Regulatory Commission
101 Marietta Street, N.W., Suite 2900
Atlanta, Georgia 30303

Administrative Judge
Thomas D. Murphy
Atomic Safety and Licensing Board U.S.
Nuclear Regulatory Commission
Washington, D.C. 20555

Office of the Secretary
Att'n: Docketing and Service Branch
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Michael D. Kohn, Esq.
Kohn, Kohn & Colapinto
517 Florida Avenue, N.W.
Washington, D.C. 20001

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

*Mitzi A. Young, Esq.
*Charles Barth, Esq.
*John T. Hull, Esq.
U.S. Nuclear Regulatory Commission
Office of the General Counsel
One White Flint North, Stop 15B18
11555 Rockville Pike
Rockville, MD 20852

Carolyn F. Evans, Esq.
U.S. Nuclear Regulatory Commission
101 Marietta Street, N.W., Suite 2900
Atlanta, Georgia 30323-0199

Adjudicatory File
Atomic Safety and 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

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