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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 PETITION FOR REVIEW OF ORDER TO PRODUCE ATTORNEY NOTES OF PRIVILEGED COMMUNICATIONS

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.786, Georgia Power Company ("Georgia Power") petitions the Commission for interlocutory review of an Atomic Safety and Licensing Board ("Licensing Board") order to produce an attorney's notes of a confidential and privileged attorney-client communication.[1] The Licensing Board's order is clearly erroneous because it declines to follow the law established by the Supreme Court in Upjohn v. United States, 449 U.S. 383 (1981), as well as the NRC rules governing discovery of trial preparation material. Interlocutory review is appropriate because the order will destroy the confidentiality and privilege of the attorney-client communications recorded in the attorney's notes. The order therefore threatens Georgia Power with an immediate and serious irreparable impact which, as a practical matter, can not be

[1] By order dated September 13, 1995, the Commission stayed the Licensing Board's ruling. The order also directed that Georgia Power's petition for review be filed in a manner to ensure receipt by close of business on September 20, 1995, that any response be filed in a like manner by September 29, 1995, and that the petition and responses address the merits of the dispute. The order established a twenty-page limit for these filings, exclusive of affidavits.

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alleviated through later review. The order also threatens to affect the basic structure of this proceeding in a pervasive or unusual manner by turning this proceeding into an attack on counsel.

Georgia Power respectfully requests oral argument before the Commission on this important matter. See 10 C.F.R. § 2.763.

II. SUMMARY OF THE DECISION AND STATEMENT OF THE RECORD

The ruling of which review is sought was made orally on the record by the Licensing Board on September 6, 1995. Tr. 13154-58. It 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. Affidavit of John Lamberski (Sept. 19, 1995), ¶ 6 (hereinafter "Lamberski Aff.", attached hereto). 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 1 Superintendent, Mr. Jimmy Paul Cash, in connection with diesel start information presented in the slides. Lamberski Aff., ¶ 6 and n.2; Tr. 8104, 8113-14. The accuracy of the diesel start information has been the subject of an 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. Lamberski Aff., ¶ 4.

The notes at issue were taken by Georgia Power's counsel, Mr. Lamberski, in 1992 while investigating the events into which OI and the Department of Justice were inquiring. Lamberski Aff., ¶ 6-7; Tr. 4616. Ms. Dixon was deposed by Intervenor in this proceeding on July 20, 1994, and testified and was cross-examined in this proceeding on June 9, 1995. Tr. 8089-8176.

Following Ms. Dixon's testimony in this proceeding, Intervenor moved to compel production of the Dixon notes.[2] Intervenor argued that he needed the notes to resolve differences in Ms. Dixon's recollection between the 1994 deposition and the 1995 hearing testimony.[3] Georgia Power responded by asserting that the notes are privileged attorney-client communications and attorney work product immune from disclosure.[4] On August 3, 1995, the Licensing Board ruled that Ms. Dixon's communications were 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.[5]

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

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

[3] Georgia Power believes that the differences in Ms. Dixon's deposition and hearing testimony are minor and merely reflect her review prior to and at the hearing of contemporaneous records, as well as her refreshed recollection of other events which placed the preparation of Mr. Cash's list and the slides in sharper focus. Tr. 8093-4, 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, Intervenor's counsel did not use documents or otherwise assist Ms. Dixon to recall the historic sequence of events.

[4] Georgia Power Company's Response to Intervenor's Motion to Compel Production of Licensee's Notes of Interview of Ester Dixon (July 17, 1995).

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

privilege might be outweighed by a showing of need.[6] 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. Intervenor and Georgia Power responded on August 15 and on August 18, 1995, respectively.[7]

On September 5, 1995, the Licensing Board denied Georgia Power Company's Motion for Reconsideration. Tr. 12942. The Board's decision, however, does not appear to have turned on whether the attorney-client privilege may be outweighed by need. Indeed, the Board made no reference to this issue, nor any finding of need. Instead, it appears that the Licensing Board simply decided that the attorney-client privilege should not apply in this instance. The Board explained 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.

After an *in camera* inspection of the notes on September 6 (Tr. 13078[8]), the Board concluded "there was no material that required protection because it's attorney work product and would reveal the workings of Mr. Lamberski's mind," and ordered release of the notes. Tr. 13154. 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

[6] Georgia Power Company's Motion for Reconsideration of Order Regarding Request for Discovery Concerning Ester Dixon (August 8, 1995). "The attorney-client privilege, if an[d] [sic] 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).

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

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

announced it would 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.

III. STATEMENT WHY THE LICENSING BOARD'S ORDER IS ERRONEOUS

A. The Order is Erroneous Because It Fails to Follow Controlling Supreme Court Precedent on the Attorney-Client Privilege

The Licensing Board's order is clearly erroneous because it is inconsistent with controlling Supreme Court precedent in Upjohn. The Board decided that the attorney-client privilege was inapplicable because Ms. Dixon did not have a personal interest in confidentiality and "[t]he only thing she needed to do was to share basically ministerial-type facts." Tr. 12943. But under Upjohn, an employee's personal interest in confidentiality is irrelevant in determining whether the attorney-client privilege attaches to the employee's communications with counsel for the corporation. Under Upjohn, the privilege exists to protect the corporate-client's interest--not employees--to allow and encourage the corporate attorney to ascertain the facts so that the attorney can provide the best and most informed advice to the corporation. The fact that the communicated information consists of "ministerial-type facts" is also irrelevant under Upjohn. All that matters is that the communication was made as part of counsel's efforts to ascertain facts necessary to advise and represent his corporate client.

The Court in Upjohn set forth a five-part test to determine whether the privilege applies in the corporate setting. The five criteria are:

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

449 U.S. at 394-95. The communications reflected in the Dixon notes satisfy each of these criteria. Lamberski Aff., ¶¶ 6, 8-10.[2]

No part of this test requires ascertaining whether an employee has a "personal interest" in the confidentiality of her communications with counsel. The interest of the employee is not even one of the criteria articulated in Upjohn. Instead, Upjohn examines only the corporate interest--whether the information is necessary to supply the basis for legal advice to the corporation. This focus on the corporate interest is appropriate because the privilege belongs to, and operates for the protection of, the corporation. Id. at 390 ("[T]his Court has assumed that the privilege applies when the client is a corporation."); Citibank v. Andros, 666 F.2d 1192, 1195 (8th Cir. 1981) ("The privilege . . . belongs to the corporation.").

Similarly, none of the Upjohn criteria require ascertaining whether information in an employee's possession is ministerial or not. The fact that Ester Dixon's role in the communications was "to share basically ministerial-type facts" is entirely consistent with the application of the

[2] Satisfaction of these factors was addressed in the pleadings below (see, e.g., Georgia Power Company's Motion for Reconsideration of Order Regarding Request for Discovery Concerning Ester Dixon (Aug. 8, 1995) at 5-6) and was undisputed.

privilege in this instance. The Supreme Court held in Upjohn 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 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 employees who are not part of the "control group":

> Middle-level -- and indeed lower-level -- employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.

Id. at 391. One would expect that the information "[m]iddle-level" or "lower-level" employees could contribute would often consist of "basically ministerial-type facts." The protection for communications between employees and counsel for the corporation afforded under Upjohn does not depend on the "importance" of the information, *per se*, but rather on the necessity of the information -- however mundane or "ministerial" -- for counsel to provide sound and informed legal advice to the corporation. Indeed, often the most crucial information upon which cases such as this turn amounts to nothing more than "ministerial-type facts."

Implicit in the Board's ruling is the notion that, because the communications between counsel for Georgia Power and Ms. Dixon involved the investigation of facts, those communications are not protected by the attorney-client privilege. The mere fact that factual investigation may be involved in a legal task does not revoke the protection accorded privileged attorney-client

communications. As explained in Arcuri v. Trump Taj Mahal Associates, 154 F.R.D. 97 (D.N.J. 1994),

> communications engaged in for the purpose of obtaining and providing "advice" or "opinion" are protected, and may, on the attorney's part, constitute something more than telling the client "do this" or "don't do that." In this court's view, where an attorney, pursuant to inquiries by a client, engages in an investigation, the purpose of which is to provide a basis for responding to the client's queries, and then discusses with the client the investigation, this communication falls within the attorney-client privilege. It would be extraordinarily difficult to separate, in such a situation, the attorney's discussion with his client relating to any cold, hard "facts" which might be interspersed in such a discussion from the privileged content. And . . . if the revelation of part of the communication would lead to an inference as to the confidential content of the communication, it too should come under the protection. . . . It is far more appropriate under these circumstances, when seeking the factual content underlying the communication, to seek these from the client . . . than to do so from the attorney and risk the very real danger of intruding upon the confidential communication.

154 F.R.D. at 104.[10/] Indeed, the same type of factual investigation that occurred here was sufficient in Upjohn to invoke the protection of the attorney-client privilege:

> In Upjohn, counsel for Upjohn conducted an internal corporate investigation concerning questionable overseas payments. . . . [T]he overseas payment issue raised legal questions with the IRS and SEC. Thus, a required element of the investigation was that it be performed with legal skills in order that the questionable payments be fully understood from a legal perspective. As the Supreme Court noted, "The first step in resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant."

[10/] Georgia Power has never sought to protect the facts and information in Ms. Dixon's possession. Georgia Power recognizes that such facts are not protected (see Upjohn, 339 U.S. at 395-96), and indeed Intervenor has had multiple opportunities (of which he has not taken advantage) to ascertain all of the relevant facts from Ms. Dixon and Georgia Power. See discussion on page 12 infra. All Georgia Power has argued and maintains is that it is improper to elicit those facts by reading an attorney's protected notes. See John William Gergacz, Attorney-Corporate Client Privilege 3-41-42 (2d ed. 1990)("The discovering party may have access to those facts from any source except the attorney, since that source of information is excluded by virtue of the privilege."). "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from its adversary." Upjohn, 449 U.S. at 396.

John William Gergacz, Attorney-Corporate Client Privilege 3-18-19 (2d ed. 1990) (citations omitted).

Because the communications at issue here satisfy all five factors under the Upjohn test, the Commission should reverse the Board's ruling and determine that these notes are absolutely protected under the attorney-client privilege. There is no basis to depart from the law established by the highest court of the land.

B. The Licensing Erred in Allowing Discovery of Work-Product Without Any Showing of Need and Hardship

The Licensing Board also erred in allowing discovery of attorney work-product material. The Board failed to make the "substantial need" and "undue hardship" findings that are necessary to overcome the work product immunity.

The work product doctrine is codified in the NRC's Rules of Practice at 10 C.F.R. § 2.740(b)(2), which provides:

> 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, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the presiding officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

This is a long-standing rule,[11] and like Rule 26(b)(3) of the Federal Rules of Civil Procedure from which it is derived, it reflects the "strong public policy that a lawyer's work be entitled to privacy." Upjohn, 449 U.S. at 397-98.

As reflected in the rule quoted above, the work product doctrine protects from disclosure "(1) documents and tangible things otherwise discoverable; (2) prepared in anticipation of litigation; (3) by the party or their attorney." Henry Allen, Diane Marrone, and Susan Settino, CLI-94-8, 39 N.R.C. 336, 357 (1994). The Dixon notes satisfy this test. As discussed above (at 2-3, supra), the notes were taken by Georgia Power's counsel while investigating events into which OI and the Department of Justice were inquiring. Tr. 4616; Lamberski Aff. ¶ 6-7. Where an attorney prepares a document in the course of an active investigation focusing upon specific events and a specific possible violation by a specific party, it has litigation sufficiently in mind for that document to qualify as attorney work product. Safecard Services, Inc. v. SEC, 926 F.2d 1197, 1203 (D.C. Cir. 1991).[12] Thus, the Dixon notes are documents that were prepared by counsel in anticipation of litigation.

Moreover, notes of a witness interview by an attorney with a client employee, are precisely the type of material sought to be protected under the work-product doctrine.

> Although th[e] language [of Rule 26] does not specifically refer to memoranda based on oral statements of witnesses, the Hickman court stressed the danger that compelled disclosure of such memoranda would reveal the attorney's mental processes. It is clear that

[11] See Commonwealth Edison Co. (Zion Station Units 1 and 2), ALAB-196, 7 A.E.C. 457, 460 (1974); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 N.R.C. 1144, 1159-62 (1982).

[12] The Licensing Board earlier ruled that documents prepared during the NRC investigation are attorney work product because of the reasonable belief that there would be some form of enforcement litigation. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-18, 38 N.R.C. 121, 123-24 (1993).

> this is the sort of material the draftsmen of the Rule had in mind as deserving special protection.

Upjohn, 449 U.S. at 400. "Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes . . .'what he saw fit to write down regarding witnesses' remarks . . .'the statement would be his [the attorney's] language, permeated with his inferences.'" Id. at 399-400 (citations omitted) Were discovery of such work-product to be permitted

> much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman v. Taylor, 329 U.S. 495, 511 (1947).

Under the Commission's rules (like the Federal Rules), where discovery of work-product material is sought, the presiding officer must first determine whether the party seeking discovery "has substantial need of the materials . . . and . . . is unable without undue hardship to obtain the substantial equivalent of the materials by other means." 10 C.F.R. § 2.740(b)(2) (emphasis added); see Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), CLI-87-8, 26 N.R.C. 6, 10-11 (1987). This finding is a necessary first step before a presiding officer may order production of work-product material. Only after this finding is made must the presiding officer consider the extent to which disclosure may reveal the mental impressions of the attorney. See 10 C.F.R. § 2.740(b)(2) ("In ordering discovery of such materials when the required showing

has been made, the presiding officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney. . .") (emphasis added).[13]

The Licensing Board omitted the first step entirely. It made no finding that the Intervenor has substantial need for the Dixon notes and could not obtain the substantial equivalent of those notes by other means. Instead, the Licensing Board jumped to the end of the work product analysis required by 10 C.F.R. § 2.704(b)(2) in holding that there are no materials that require protection as attorney work product because they would reveal the workings of Mr. Lamberski's mind. Tr. 13154. The Board therefore failed to follow the work product doctrine as established by the Rules of Practice.

Nor did Intervenor make the required showing in this case. As Georgia Power pointed out in the pleadings below,[14] Intervenor has had two opportunities to obtain the underlying facts reflected in the Dixon notes directly from Ms. Dixon -- at her deposition and during her hearing testimony -- and on both occasions asked a substantial number of questions about her involvement and on either occasion could have asked Ms. Dixon specifically if and how her recollection of events surrounding the typing of the Cash list had changed.[15] Intervenor could also have asked Georgia Power in interrogatories to describe Ms. Dixon's recollection of the Cash list.

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[13] There is an even higher standard of protection for "opinion work product." Opinion work product may be discoverable only upon extraordinary justification. South Texas, supra, CLI-87-8, 26 N.R.C. at 10, citing Hickman v. Taylor, 329 U.S. 495, 513 (1947); In re Murphy, 560 F.2d 326, 336 (8th Cir. 1977).

[14] Georgia Power Company's Response to Intervenor's Motion to Compel Production of Licensee's Notes of Interview of Ester Dixon (July 17, 1995) at 10; Georgia Power Company's Motion for Reconsideration of Order Regarding Request for Discovery Concerning Ester Dixon (Aug. 8, 1995) at 6-7.

[15] This is distinguishable from the situation where a party was unsuccessful in its attempt to obtain information by other means, e.g., by deposition where a witness was unable to answer a question pertaining to that information. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 N.R.C. 1144, 1167 (1982).

Intervenor made no such use of these opportunities to obtain the underlying facts without inquiring into privileged communications.[16] Accordingly, Intervenor should not now be able to demand disclosure of privileged communications in order to develop factual information that he declined or failed to pursue in discovery. Facts should be determined by the normal discovery process during the period assigned for discovery, and not by invasion of privileged communications. "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary." Hickman, 329 U.S. at 516. The Board therefore has no basis for rewarding Intervenor for its inadequacy in pursuing discovery and in cross-examining witnesses.[17]

In summary, there was no showing or finding of "substantial need" and "undue hardship" required by the NRC rules. Therefore, the Licensing Board's ruling on work product should also be reversed.

IV. STATEMENT WHY COMMISSION REVIEW SHOULD BE EXERCISED

A. Interlocutory Review Is Appropriate Under Section 2.786

The Commission has the discretion to exercise appellate review of an otherwise interlocutory order, in a manner akin to a motion for directed certification, if the petitioner can satisfy either of the two criteria in section 2.786(g). Sequoyah Fuels Corp. (Gore, Oklahoma Site),

[16] As previously noted, Georgia Power has never sought to protect discovery of relevant facts from proper sources, such as Ms. Dixon, but has merely maintained that is improper to elicit those facts by reading an attorney's protected notes. See note 10 supra.

[17] As Georgia Power also argued below, a desire to impeach or corroborate a witness' testimony is generally insufficient to overcome the protection afforded to an attorney's record's of interviews. Georgia Power Company's Response to Intervenor's Motion to Compel Production of Licensee's Notes of Interview of Ester Dixon (July 17, 1995) at 8, citing In re Grand Jury Investigation, 599 F.2d 1224, 1233 (3d Cir. 1979); Young v. United Parcel Service, 88 F.R.D. 269, 271 (D.S.D. 1980).

CLI-94-11, 40 N.R.C. 55, 59 (1994); Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-09, 35 N.R.C. 156, 158 (1992). Both of the section 2.786(g) criteria are met here.

1. THE RULING THREATENS GEORGIA POWER WITH IMMEDIATE AND SERIOUS IRREPARABLE IMPACT

In the case at bar, if Georgia Power is required to produce its attorney notes, the confidentiality and privilege of those notes will be destroyed. Such a destruction of the privilege constitutes an immediate and serious irreparable impact which as a practical matter can not be alleviated through later review of the presiding officer's final decision. 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 Co. (Comanche Peak, Units 1 and 2), CLI-83-6, 17 N.R.C. 333, 334 (1983). "This 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).[18]

The appropriateness of interlocutory review of an order that would require production of a confidential document has been recognized by the Commission in this very case. In Georgia

[18] See also Admiral Insurance Co. v. U.S. Dist. Ct. for the Dist. of Arizona, 881 F.2d 1486, 1491 (9th Cir. 1989) ("In view of the irreparable harm a party likely will 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. Dep't of Energy v. Brimmer, 776 F.2d 1554, 1559 (Temp. Emer. Ct. App. 1985), cert. denied, 475 U.S. 1045 (1986) ("[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 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.

Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-05, 39 N.R.C. 190, 193 (1994), the Commission granted the NRC Staff's motion for interlocutory review of a Licensing Board order requiring the Staff to produce a confidential OI report. The Commission explained:

> Because the adverse impact of that release would occur now, the alleged harm is immediate. The impact of the order to release a report that would otherwise be held in confidence is irreparable and could not be alleviated through future review of a final decision of the Licensing Board.

Id. Similarly, in Pacific Gas & Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), CLI-93-18, 38 N.R.C. 62 (1993), the Commission stated that disclosure of an INPO document seemed to fall within the narrow class of interlocutory orders for which Commission review might be appropriate (but the controversy was resolved by an agreement among the parties). These same principles apply here and call for interlocutory review to prevent the irreparable destruction of confidentiality and privilege of communications between Georgia Power and its counsel.

2. THE RULING AFFECTS THE BASIC STRUCTURE IN A PERVASIVE AND UNUSUAL MANNER

The Licensing Board's ruling also threatens to affect the basic structure of this proceeding in a pervasive and unusual manner. Georgia Power is very 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.

For example, early in this proceeding, Intervenor moved to compel production of affidavits prepared by counsel to memorialize discussions with certain Georgia Power employees. 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 (1993). Intervenor later submitted allegations that Georgia Power's counsel had engaged in a cover-up. See Board Notification 94-07 (Mar. 24, 1994). Further, in the first phase of this proceeding, Intervenor sought to subpoena one of Georgia Power's attorneys, and then suggested that this counsel be sequestered and required to withdraw from the proceeding. Motion for Subpoena of James Joiner (Dec. 23, 1994); Letter from M. Kohn to E. Blake and D. Lewis (Dec. 27, 1994). In the current round of hearings, Intervenor has repeatedly attempted to invade the confidentiality of communications between Georgia Power and its attorneys.[12/] These attempts included an ex parte presentation to the Licensing Board in which Intervenor alleged that Georgia Power's counsel acted improperly in preparing discovery responses, a response to a notice of violation, and a motion for summary disposition, and again proposed calling one of Georgia Power's counsel as a witness. Tr. 12045-69, 12131-37, 12245-58, 12261-71.

Georgia Power views Intervenor's attempt to obtain Ms. Dixon's notes as part of Intervenor's continuing trial tactic of attacking counsel to harass Georgia Power and interfere with its representation. If Intervenor succeeds in subverting the proceeding in this fashion, its completion could be delayed considerably. Declining to review the Board's ruling would in effect sanction Intervenor's misconduct, adversely affecting the proceeding in a pervasive and unusual manner.

[12/] Tr. 7519 (attempted inquiry into an employee's communications with counsel); Tr. 10799-821 (attempted inquiry into counsel's role in responding to requests for admissions); Tr. 11100 (attempted inquiry into counsel's role in response to 2.206 petition); Tr. 11210-11 (attempted inquiry into attorney-client communications); Tr. 13942-46 (attempted inquiry into counsel's role in preparing a supplemental discovery response). See also Intervenor's Supplemental Motion to Compel Interview Notes and Other Documents Known to Georgia Power Company's Counsel When Preparing the Response to the Notice of Violation (July 24, 1995).

B. Appellate Review Is Also Appropriate Under Section 2.786(b)(4)

Review of the Licensing Board's order is also appropriate pursuant to the considerations set forth at 10 C.F.R. § 2.786(b)(4). As discussed above, the Board's order is a departure from and contrary to established law, in that it declines to follow the law established by the Supreme Court in Upjohn. The Board's ruling constitutes a prejudicial procedural error, because it will invade and destroy the confidentiality that exists between Georgia Power and its counsel.

Appellate review is also appropriate under section 2.786(b)(4) because a substantial and important question of law has been raised, and review of this question is in the public interest. 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. 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.

In Upjohn, the Court stated 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 is inconsistent with this public interest. Once destroyed, the confidentiality of privileged communications cannot be restored. Even a disclosure under a protective order is damaging to the purposes of the privilege. Such a precedent would

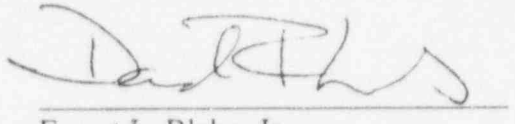
cause attorneys and their clients to fear similar disclosures in other cases and would have a serious chilling affect on attorneys' abilities to make factual inquiries in order to advise their clients. It would create the sort of uncertainty Upjohn strongly advises against. See Lamberski Aff., ¶ 11.

The Licensing Board's ruling, if sustained by the Commission, would also create a precedent that would allow invasion of the confidential communications between the NRC Office of General Counsel's ("OGC") and the NRC Staff. In the course of investigations, enforcement actions, or other proceedings, attorneys in OGC may communicate with an NRC employee to ascertain facts necessary to advise and represent the Commission. Under the Licensing Board's ruling, if that NRC employee did not have a personal interest in confidentiality and if the factual matters inquired into were sufficiently mundane, the communications of NRC attorney's and their notes would also be subject to discovery. Clearly, such an invasion would hamper the ability of NRC attorneys to represent and advise the Commission and chill necessary communications. Such a result is clearly unacceptable if NRC lawyers are expected to provide the most informed advice. It is no less unacceptable in the corporate setting.

V. CONCLUSION

For all of the reasons stated above, the Commission should review the Licensing Board's order on the Dixon notes, and should rule that the Board's order was erroneous in that it failed to protect Georgia Power's attorney-client and work-product privileges over those notes. The Commission should also provide an opportunity for oral argument on this important matter.

Respectfully submitted,



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