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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman[1]

In the Matter of the GEORGIA POWER COMPANY (Vogtle Electric Generating Plant, Units 1 and 2)	Docket Nos. 50-424-OLA-3 50-425-OLA-3

CLI-95-15

MEMORANDUM AND ORDER

I. Introduction

We have before us a petition by the Georgia Power Company (GPC) for interlocutory review of an Atomic Safety and Licensing Board order made orally on the record on September 6, 1995. (Transcript at 13154-58). The order compels GPC to produce notes taken by a GPC attorney on communications with a GPC employee, Ms. Ester Dixon. GPC claims the attorney notes are protected from disclosure under both the attorney-client privilege and the work-product doctrine. The NRC staff takes no position in this dispute. The Commission grants interlocutory review, concludes that the notes are privileged, and accordingly vacates the Licensing Board's order.

[1] This decision was made by Chairman Jackson under delegated authority, as authorized by NRC Reorganization Plan No. 1 of 1980, after consultation with Commissioner Rogers. Commissioner Rogers has stated his agreement with this decision.

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II. Background

The intervenor, Allen Mosbaugh, seeks notes taken by John Lamberski, an attorney for GPC, during 1992 interviews with Ester Dixon, a GPC employee (the "Dixon notes"). In her capacity as a secretary at the Vogtle facility, Ms. Dixon typed certain documents that were used by GPC in a presentation to the NRC made on April 9, 1990. These documents are relevant to the intervenor's allegations that GPC misled the NRC about the condition of the Vogtle diesel generators following a loss of off-site power that occurred at Plant Vogtle on March 20, 1990. The intervenor alleges that GPC presented false and misleading information on the number of successful consecutive starts of the diesel generators. Particularly at issue is a factual dispute over the sequence in which GPC prepared two documents on the diesel generator starts.

The intervenor deposed Ms. Dixon in July, 1994. She testified in this proceeding on June 9, 1995. The intervenor claims that Ms. Dixon's testimony before the Board is inconsistent with her earlier deposition statements, and that on both occasions she has been unable to recall significant facts. To resolve any differences in Ms. Dixon's statements between the 1994 deposition and the 1995 hearing testimony, and to obtain factual information that Ms. Dixon may have since forgotten, the intervenor seeks the notes of Ms. Dixon's 1992 statements to GPC counsel.

On June 30, 1995, the intervenor moved to compel production of the Dixon notes. GPC asserted both the attorney-client privilege and work-product immunity. GPC stated that the notes were taken by Mr. Lamberski during his own investigations into allegations of inaccurate diesel start information. Those allegations arose first in 1990 and prompted an NRC Office of Investigations (OI) investigation and a Department of Justice inquiry. In response to these inquiries, GPC's counsel, John Lamberski, conducted his own investigation into the events surrounding the diesel generator starts. Mr. Lamberski states that in August, 1992, he interviewed Ms. Dixon on one occasion at the Vogtle facility, and later spoke with her on the telephone on three occasions.[2] He took three pages of notes on these discussions. GPC states that Ms. Dixon was aware that the purpose of the interviews was for the corporation to obtain legal advice.

The Licensing Board ordered GPC to present the notes for an in camera inspection. LBP-95-15, 42 NRC ___ (Aug. 3, 1995). After GPC moved for reconsideration of the Board's order, the Board requested the parties to brief the standards for the attorney-client privilege provided under Upjohn Co. v. United States, 449 U.S. 383 (1981)(Transcript at 10820-21). The Board subsequently denied the motion for reconsideration (Transcript at 12942). Following an in camera inspection of the notes, the

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[2] Lamberski Affidavit at 3, attached to Georgia Power Company's Petition for Review of Order to Produce Attorney Notes of Privileged Communications (GPC Appeal Brief)(Sept. 20, 1995).

Board concluded that "there was no material that required protection because it's attorney's work product and would reveal the workings of Mr. Lamberski's mind," and ordered release of the notes to the parties (Transcript at 13154).

GPC indicated that it would appeal and moved for a stay of the Board's order, pending appellate review. The Commission on September 13, 1995, stayed the effectiveness of the order, pending receipt of the parties' briefs and a Commission decision on whether to take review. The Commission now grants GPC's petition for review and, for the reasons in this decision, vacates the Licensing Board's order.

III. Interlocutory Review

The Commission does not ordinarily entertain interlocutory appeals. See Georgia Power Co. (Vogtle Elec. Generating Plant, Units 1 & 2), CLI-94-15, 40 NRC 319, 321 (1994). A petitioner for interlocutory review must demonstrate that review is warranted because the Board order affects the proceeding in a "pervasive or unusual manner" or because it results in "irreparable impact." See 10 C.F.R. § 2.786(g)(1)-(2). See also Georgia Power Co. (Vogtle Elec. Generating Plant, Units 1 & 2), CLI-94-5, 39 NRC 190, 193 (1994). Given the circumstances in this proceeding, GPC has satisfied the "irreparable impact" criterion. Although typically discovery orders can be reviewed on appeal following a final judgment, and a claim of privilege is not alone sufficient to justify interlocutory review, here an

erroneous disclosure of documents ruled later to be absolutely privileged could prove irreparable. The potential difficulty of unscrambling and remedying the impact of an improper disclosure in this lengthy, complex, and contentious proceeding, which spans years of litigation and has generated a massive record, presents exceptional circumstances, making immediate review appropriate.[3] This dispute poses a discrete legal question, more easily resolved now, lest we be unable later to tailor meaningful relief. Moreover, "maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice,"[4] and here the Licensing Board's decision appears in conflict with federal common law standards on the privilege.

IV. Analysis

Pursuant to 10 C.F.R. § 2.740(b)(1), parties in formal administrative proceedings may obtain discovery regarding any matter, "not privileged," relevant to the subject matter involved in the proceeding. The oldest common law privilege for confidential communications, the attorney-client privilege, protects from discovery confidential communications from a client to an attorney made to enable the attorney to provide informed legal advice. See Upjohn v. United States, 449 U.S. 383, 389-96

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[3] See, e.g., In re Bieter Co., 16 F.3d 929, 931-32 (8th Cir. 1994); Admiral Ins. Co. v. United States Dist. Ct. for the Dist. of Ariz., 881 F.2d 1486, 1491 (9th Cir. 1989).

[4] In re Bieter Co., 16 F.3d 929, 931 (8th Cir. 1994)(quoting Harper & Row Publishing Co. v. Decker, 423 F.2d 487, 492 (7th Cir. 1970), aff'd, 400 U.S. 348 (1971)).

(1981). It has long been established that the attorney-client privilege also applies when a corporation is the client. See id. at 390. In Upjohn, the Supreme Court addressed the scope of the privilege as applied to communications by corporate employees, and held that each case should be evaluated individually to determine whether applying the privilege would further its underlying purposes. See id. at 396-97.

One such purpose, the Court observed, is to "encourage full and frank communication between attorneys and their clients." Id. at 389. Sound legal advice "depends upon the lawyer's being fully informed by the client." Id. Therefore, the lawyer's first task when faced with a legal problem is to obtain the full factual background, "sifting through the facts with an eye to the legally relevant." Id. at 390-91. Because the employees who possess relevant information needed by counsel to render legal advice often are middle and lower-level employees, the Court in Upjohn rejected limiting application of the privilege to the "control group" of a corporation, i.e., officers and agents. Id. at 392. Accordingly, the Court ruled that questionnaires sent by corporate counsel to corporate managers abroad, regarding questionable payments to foreign officials, and the memoranda and notes of interviews conducted by counsel with the recipients of the questionnaires, fell within the scope of the attorney-client privilege. The Court noted that the communications between the Upjohn Company employees and counsel (1) were needed as a basis for legal advice sought by the corporation; (2) involved matters

within the scope of the employee's duties; (3) were made by employees sufficiently aware that they were being questioned for the corporation to obtain legal advice; and (4) were considered confidential when made and maintained confidential. Id. at 394-95.

Here, the Licensing Board found Upjohn distinguishable. In Upjohn, reasoned the Board, the managers who responded to counsel's questions might have feared consequences to themselves from revealing possible illegal activities, and therefore the confidentiality of communications with counsel was crucial. In contrast, Ms. Dixon's "interest in confidentiality was at a minimum" because "[t]he only thing she needed to do was to share basically ministerial-type facts" (Transcript at 12942-43).

In its petition for review, GPC submits that whether or not the information provided by Ms. Dixon was "ministerial" is irrelevant, and instead what matters is that Ms. Dixon was questioned about information needed by GPC counsel to advise the corporation. GPC Appeal Brief at 5. GPC argues that the circumstances here are closely analogous to those of Upjohn. Specifically, GPC contends that (1) the information Ms. Dixon provided was necessary as a basis for providing legal advice to the corporation, and was not available from "control group" officers; (2) the interviews concerned matters within the scope of Ms. Dixon's duties; (3) the statements were considered confidential when made and kept so, and (4) Ms. Dixon was aware

that the purpose of the questioning was for the corporation to obtain legal advice. GPC Appeal Brief at 6.

Applying Upjohn's principles, the Commission finds the Dixon notes protected by the attorney-client privilege. GPC sufficiently has shown that the notes would not have been created but for GPC's need for legal counsel. At the time of the August 1992 conversations with Ms. Dixon, GPC was already the subject of inquiries by OI and the Department of Justice into intervenor's allegations concerning the diesel generator starts. Mr. Lamberski states that he interviewed Ms. Dixon as part of his own investigation, as GPC's counsel, into the diesel generator matter. He next states that his questions to Ms. Dixon focused on the typing of documents, a function within her duties at GPC. Mr. Lamberski also states that Ms. Dixon was aware at the time of the interview that she was being questioned for GPC to obtain legal advice concerning the diesel allegations. He further states that the interview notes have been treated as privileged material.[5]

The intervenor claims that because Ms. Dixon's actions did not subject GPC to possible liability, she was in effect a mere third party "fact witness" to the actions of others.[6] The intervenor relies upon a state-court decision in Arizona, which

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[5] See generally Lamberski Affidavit. None of the facts stated in Mr. Lamberski's affidavit has been called into dispute by counter-affidavits or other evidence.

[6] See Intervenor's Opposition to GPC's Petition for Review of Order to Produce Attorney Notes (Intervenor's Appeal Brief)(Oct. 3, 1995) at 10-11.

held that the memoranda of interviews conducted with a nurse and scrub technician present during an operation were not privileged because "[i]f the employee is not the one whose conduct gives rise to potential corporate liability, then it is fair to characterize the employee as a 'witness' rather than as a client." Samaritan Found. v. Goldfarb, 176 Ariz. 497, 862 P.2d 870, 877 (1993).

The Commission declines to follow this interpretation of Upjohn. To the Commission's knowledge, it is espoused nowhere else but in Samaritan. That case is not controlling here. Cf. Fed. R. Evid. 501 (federal courts apply federal common law of privilege, except where state law governs particular controversy). The Commission notes, additionally, information recently brought to our attention by GPC, indicating that the Arizona legislature by statute specifically has overruled Samaritan, to bring the elements of Arizona's attorney-client privilege into accord with the approach of federal courts.[7]

The federal common law standard, derived from Upjohn, focuses upon the primary purpose of the communication, not the specific behavior of the employee. Key to application of the attorney-client privilege is a showing that the communication was made for the corporation to obtain legal advice, that it was made confidentially, and that it was not disseminated beyond those

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[7] See Letter from Ernest L. Blake, Jr., GPC counsel, to Office of Commission Appellate Adjudication (Oct. 25, 1995), referencing Arizona Revised Statutes § 12-2234 (signed into law Apr. 26, 1994).

with a need to know.[8] These factors "form the crux of the justification for the privilege and allow courts to apply the privilege on a case by case basis."[9]

Not every communication by an employee to counsel is privileged, however. Otherwise, a corporation could conceal information simply by routing it to counsel. Communications made for business or personal advice, for example, are not covered by the privilege.[10] Accordingly, a corporate status report or the minutes of a meeting do not become protected simply because they are transmitted to counsel, where no request for legal advice was involved.[11]

Upjohn thus has been interpreted as finding privileged "communications made by corporate employees concerning matters pertinent to their job tasks, regardless of echelon, if sought by the corporation's attorney in order to formulate and render legal advice to the corporation."[12] Contrary to the approach taken by

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[8] See Securities & Exchange Comm'n. v. Gulf & W. Indus., Inc., 518 F. Supp 675, 681 (D.D.C. 1981).

[9] Id.

[10] Id.

[11] See In re Ampicillin Antitrust Litig., 81 F.R.D. 377, 385 n.9 (1978).

[12] In re LTV Securities Litig., 89 F.R.D. 595, 602 (N.D. Tex. 1981). See also First Chicago Int'l v. United Exchange Co., 125 F.R.D. 55, 57 (S.D.N.Y. 1989)(privileged communication resulted from corporation's need for legal advice); Command Transp., Inc. v. Y.S. Line (USA) Corp., 116 F.R.D. 94, 96 (D. Mass. 1987)(Upjohn's "legacy" is to encourage focus on whether applying privilege would promote flow of information to counsel regarding issues on which corporation seeks legal advice); Leucadia, Inc. v. Reliance Ins. Co., 101 F.R.D. 674, 679

the Arizona Supreme Court in Samaritan, the federal courts have articulated no apparent exception for communications made by employees who have not embroiled the corporation in legal conflict. See, e.g., In re LTV Securities Litigation, 89 F.R.D. 595 (N.D. Tex. 1981)(accountant hired only after period of questionable activity aided corporate counsel in counsel's internal investigation of accounting improprieties).

The attorney-client privilege "rests on the need of the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." Upjohn, 449 U.S. at 389 (emphasis added)(citing Trammel v. United States)), 445 U.S. 40, 51 (1980). The Supreme Court rejected the "control group" test because it would hamper the communication of "relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." Id. at 392. That concern is difficult to reconcile with Samaritan. Limiting application of the privilege to those communications made by employees whose actions necessarily have subjected the corporation to liability, as Samaritan proposes, would frustrate the ability of corporate

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(S.D.N.Y. 1983)(counsel's factual investigation for purpose of rendering legal advice), cert. denied, 490 U.S. 1107 (1989); In re Ampicillin Antitrust Litig., 81 F.R.D. 377, 385, 387 (D.D.C. 1978)(focus on relevance of the communication to particular legal problem).

counsel to obtain critical information particular employees may have gleaned in the course of their corporate duties.[13]

The corporate employee's personal "interest in confidentiality," apparently the focus of the Licensing Board, is not determinative. In the corporate setting, the attorney-client privilege does not belong to the employee; it belongs to the corporation and can be waived by the corporation. Any interest the employee may have had in the confidentiality of the communications will be protected only so long as the corporation chooses.

The intervenor also argues that the attorney notes must be disclosed because Georgia Power employed Mr. Lamberski not for legal advice, but merely "to investigate facts associated with the submission of false information concerning diesel starts,"[14] which, in the intervenor's view, was a "business function," unencompassed by the attorney-client privilege.[15] The Commission cannot agree. That GPC officers could have themselves undertaken an investigation of the allegations and drafted a response to the NRC does not eclipse the special role and training that an attorney might bring to bear in "sifting through

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[13] Moreover, it would be no easy task to discern whether a particular employee's actions may have subjected a corporation to liability. Employees performing even "ministerial-type" duties might be knowing participants in an illegal scheme.

[14] Intervenor's Appeal Brief at 16.

[15] See generally id. at 15-18.

the facts" for the legally relevant,[16] particularly given that at the time GPC was the subject of at least two federal investigations into alleged serious regulatory and criminal violations.

Of course, the attorney-client privilege protects only the communications of facts from client to attorney, not the underlying facts themselves. Upjohn, 449 U.S. at 395-96. Ms. Dixon herself can be and has been questioned by the intervenor's counsel about the documents that she typed. During the hearing the intervenor had the opportunity to question Ms. Dixon about any changes or discrepancies between her deposition statements and her testimony before the Board. Given the absolute nature of the attorney-client privilege, the intervenor cannot use Mr. Lamberski's notes to obtain further information on Ms. Dixon's activities.[17]

The Commission adds a final word of caution. Many companies -- including NRC licensees -- employ attorneys to investigate incidents involving possible regulatory or statutory violations. While the Commission has ruled above that Upjohn may confer an attorney-client privilege upon communications between the attorney involved in such an investigation and a company employee, it is equally clear that Upjohn does not eliminate any reporting requirements imposed by NRC regulations or any other

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[16] Upjohn, 449 U.S. at 390-91; see also In re LTV Securities Litig., 89 F.R.D. at 601.

[17] Having found the notes privileged material, we need not address the applicability of the work product doctrine.

authority. Accordingly, if an attorney investigating a matter for a client discovers information that is required to be reported to the NRC, that reporting requirement is still legal, valid, and binding upon the company. Upjohn may not be used as a shield to avoid providing required information.

V. Conclusion and Order

The Commission agrees with GPC that the Dixon attorney notes are protected from discovery under the attorney-client privilege. Consistent with the foregoing opinion, the Commission hereby orders:

(1) The Georgia Power Company's petition for review dated September 20, 1995, is granted.

(2) The Atomic Safety and Licensing Board's order made orally on the record on September 6, 1995, compelling production of Mr. Lamberski's notes, is vacated.

It is so ORDERED.

For the Commission

John C. Hoyle
Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of November, 1995.

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 MEMORANDUM & ORDER (CLI-95-15) 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.

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Peter B. Bloch, Chairman
Atomic Safety and Licensing Board
Mail Stop T-3 F 23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Thomas D. Murphy
Atomic Safety and Licensing Board
Mail Stop T-3 F 23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
James H. Carpenter
Atomic Safety and Licensing Board
Mail Stop T-3 F 23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
James H. Carpenter
933 Green Point Drive, Oyster Point
Sunset Beach, NC 28468

Mitzi A. Young, Esq.
Office of the General Counsel
Mail Stop O-15 B 18
U.S. Nuclear Regulatory Commission
Washington, DC 20555

John Lamberski, Esq.
Counsel for Georgia Power Company
Troutman Sanders
Suite 5200, 600 Peachtree Street, N.E.
Atlanta, GA 30308

Ernest L. Blake, Jr., Esq.
David R. Lewis, Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, DC 20037

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MEMORANDUM & ORDER (CLI-95-15)

Michael D. Kohn, Esq.
Stephen M. Kohn, Esq.
Kohn, Kohn & Colapinto, P. C.
517 Florida Avenue, N.W.
Washington, DC 20001

C. K. McCoy
V.President Nuclear, Vogtle Project
Georgia Power Company
Post Office Box 1295
Birmingham, AL 35201

Dated at Rockville, Md. this
21 day of November 1995

Office of the Secretary of the Commission