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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Commissioners

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

INTERVENOR'S OPPOSITION TO GEORGIA POWER COMPANY'S PETITION FOR REVIEW OF ORDER TO PRODUCE ATTORNEY INTERVIEW NOTES

I. INTRODUCTION

Ester Dixon is a secretary employed by Georgia Power Company (Georgia Power). On March 20, 1990, plant Vogtle experienced a Site Area Emergency ("SAE") when off-site power was lost and the plant's emergency diesel generator failed. On April 9, 1990 Georgia Power made a presentation at Nuclear Regulatory Commission's ("NRC") Region II headquarters to address issues related to the SAE, including the reliability of the plant's emergency diesel generators. Presentation materials were drafted by Georgia Power management and were thereafter typed or otherwise prepared by Ms. Dixon between April 6th and 8th, 1990. Two documents typed by Ms. Dixon are central to the contentions currently being litigated before the Atomic Safety and Licensing Board ("Licensing Board"). The first document concerns an overhead slide shown during the April 9, 1990 presentation which indicated that one of the plant Vogtle Unit 1 diesel generators was started 18 times and that a second generator was started 19 times. Georgia Power further indicated on April 9, 1990 that the 18 and 19 starts were

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consecutive and that no problems or failures had occurred during any of these starts. The second document concerns a typed listing of all diesel starts that was prepared prior to April 9, 1990.[1]

It is uncontested that Ms. Dixon was merely a witness to the events occurring during the production of these documents; and that she has no independent liability associated with the presentation made by Georgia Power on April 9, 1990 or any statements made thereafter associated with the number of successful consecutive starts of the diesel generators.[2] It is also uncontested that she is no longer able to recall facts associated with the events surrounding her typing and preparing documents for the April 9, 1990 presentation.

Between August 19 and September 3, 1992, Ms. Dixon turned over a computer disk she made which contained documents she typed for the April 9, 1990 presentation.[3] During this same time period Ms. Dixon was interviewed on three separate occasions by Mr. Lamberski, attorney for Georgia Power. Mr. Lamberski reduced his interviews to writing ("Dixon interview notes").

The factual record suggests that one of the documents contained in the computer disk turned over by Ms. Dixon, the "Cash list," was most likely prepared on Sunday, April 8, 1990. See Tr. 4406-4408 (Cash OSI interview of August, 1990, during which Cash responded "I don't

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[1] This list was allegedly prepared by Jimmy Paul Cash and is identified in the record as "Cash Exhibit B", Georgia Power Exhibit II-23 (hereinafter "Cash list"). The Cash list is significant because it established that the asserted 18 and 19 consecutive starts of the diesel generators did not occur and that the diesel generators experienced problems and failures.

[2] On the other hand, Georgia Power management who utilized the presentation materials typed by Ms. Dixon are alleged to have presented false and misleading information about the number of successful consecutive starts of the diesel generators.

[3] It appears that the interview between Ms. Dixon and Mr. Lamberski occurred on or about August 20, 1992 because that is the date the Ms. Dixon sent a fax of all the documents she prepared the weekend in question to Mr. Lamberski. Tr. 4616.

know the date but it was the day before, I believe, the confirmation meeting in Atlanta"). Georgia Power is apparently seeking to assert that the Cash list was typed by Ester Dixon on Friday, April 6, 1990. The basis for this new assertion is contradictory testimony of Ms. Dixon presented before the Licensing Board on June 9, 1995.

On June 9, 1995, pursuant to subpoena, Ms. Dixon appeared at the hearing and testified. When questioned by Intervenor's counsel, Ms. Dixon reiterated that she could no longer recall facts and otherwise made factual statements inconsistent with her 1994 deposition testimony. See Tr. 8098-8120. At this time Ms. Dixon testified that, to the best of her knowledge, she typed the Cash List on Friday, April 6, 1990, Tr. 8111; Saturday and Sunday were reserved for editing and revising documents and preparing transparencies. Tr. 8135. This latest testimony is 180 degrees out of synch with her prior deposition testimony. During Ms. Dixon's deposition of July 20, 1994, she testified that she could not recall what she typed on Friday versus the weekend: "Q: Do you have any recollection of how may files you did on Friday, or did you begin on Saturday? A: No, sir. I don't remember." Dixon Deposition ("Dixon Dep.") P. 18 li. 21 - P. 19 li. 1. Moreover, Ms. Dixon could not recall whether she typed the Cash List in one sitting or over multiple days (Dixon Dep. p. 19, li. 2-7); she could not recall the day she finished typing the Cash list (Id., P. 19, li. 8-11; P. 11, li 19-20. Dixon further testified that:

> I'm having trouble remembering Friday, Saturday and Sunday. With respect to what was done on what day. On Friday George helped on some things. George Bockhold.

Dixon Dep. p. 17. li. 19-22; also see Dixon Dep. p. 13, li. 11-12.[4]

Ms. Dixon's memory was equally flawed when she testified before the Licensing Board

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[4] Ms. Dixon was generally unable to recall most of the facts surrounding the preparation of documents and the Cash List. On no less than 31 separate occasions during a 27 page deposition Ms. Dixon testified that she could not remember facts surrounding the production of documents prepared between April 6-8, 1990.

on June 9, 1990, during which time she indicated on 63 separate occasions that she was unable to recall facts related to her work on the presentation materials. See Tr. 8089-8171.

Based on inconsistences in her recollection and Ms. Dixon's inability to recollect essential facts, Intervenor filed a motion with the Licensing Board seeking production of the Dixon interview notes.

On September 5, 1995, the Licensing Board ordered Georgia Power to produce the notes. The Licensing Board then performed an in camera inspection of the interview notes and determined 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 disclosure. Tr. 13154. The Board ordered Georgia Power's counsel to produce the notes to the parties. Id.

On September 20, 1995 Georgia Power petitioned the Commission for interlocutory review of the Licensing Board's order to produce factual statements contained in the Dixon notes.

The sole issue before the Commission is whether the interview notes of Ester Dixon prepared by Mr. Lamberski fall within the narrow scope of the attorney-client or work product privileges where 1) it is undisputed that Ms. Dixon can no longer recall facts recorded in the notes; 2) the notes only set forth factual information; 3) Ms. Dixon had and has no personal liability concerning her typing and preparing presentation materials.

After briefing by the parties, the Licensing Board reiterated the test set forth in Samaritan Foundation v. Goodfarb, 176 Ariz 497, 862 P2d 870, 26 ALR5th 893, 911 (1993)("Samaritan") and concluded that the Dixon interview notes should be produced. In this respect, the Board stated:

> Ms. Dixon was involved in a situation in which her interest in confidentiality was at a minimum. She was really close to being a third party. There was no personal interest of hers in being protected for confidentiality. The only thing she needed to do was to share basically ministerial-type facts.

The Licensing Board further explained that:

> [I]n this instance, we are not dealing with a typical Upjohn-type case ...[in Upjohn] the people providing the information might have been worried about consequences to themselves for sharing with the attorneys."

Tr. 12942.

Georgia Power argues that turning over the Dixon interview notes is inconsistent with the holding announced by the United States Supreme Court in Upjohn v. United States, 449 U.S. 383 (1981)(Upjohn). This assertion is erroneous because the Samaritan decision conforms with the Upjohn precedent.[5] Indeed, as Upjohn did away with the "control group" test, Samaritan "reject[ed] the control group test as being both overinclusive and underinclusive." Id., at 176 Ariz 499, 862 P2d 872.

Georgia Power's argument is that Upjohn be broadly interpreted so that all communications by all employees who speak to a corporate a lawyer regarding matters within the scope of their employment be shielded by the attorney-client privilege. This interpretation of Upjohn was explicitly rejected by the Samaritan court and it should be rejected by the Commission as well.

II. ARGUMENT

A. THE LICENSING BOARD'S ORDER DOES NOT DEPART FROM UPJOHN, IT PRESENTS A NARROW AND DEFINED REFINEMENT CONSISTENT WITH THE COMMON LAW PRINCIPLES AND ATTORNEY-CLIENT PRIVILEGE AFFORDED INDIVIDUALS

As the Upjohn Court made clear, "[t]he first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." 449 U.S. at 390-391. In so doing, it is important to state from the outset that the

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[5] Significantly, Georgia Power failed to address or even mention the Samaritan decision in its Petition.

attorney-client privilege "only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." Id. at 395. "No contention can be made that the attorney-client privilege precludes disclosure of factual information." Sedco International v. Dedco, Inc., 683 F.2d 1201, 1205 (8th Cir. 1982), citing Upjohn.

Furthermore, because the attorney-client privilege "is an obstacle to the investigation of the truth [it] ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." Hydraflow, Inc. v. Endine, Inc., 145 F.R.D. 626, 632 (W.D.N.Y. 1993)(Hydraflow).

The Licensing Board has not departed from controlling Supreme Court precedent but, rather, has used Upjohn as the basis for its analytical framework to conclude, as did the court in Samaritan, that the interview notes are not privileged. The relevant inquiry is: "to which corporate employee communications does the privilege apply, not to which corporate employees does the privilege apply." Samaritan Foundation v. Goodfarb, 176 Ariz. 497, 500, 862 P.2d 870, 873 (1993).

The Licensing Board agreed with the analysis of the attorney-client privilege adopted by the Samaritan court and the Supreme Court of California, which previously announced that "the corporation [should] not be given greater privileges than are enjoyed by a natural person" and that corporations should be subject to the same limitations "as has been applied in regard to natural persons in reference to the attorney-client privilege." D.I. Chadbourne, Inc. v. Superior Court, 36 Cal. Rptr. 468, 477, 388 P.2d 700, 709 (1964)(Chadbourne). In the sometimes complex issue of attorney-client privilege in a corporate setting, this requires courts to "focus[] on the relationship between the communicator and the need for legal services." Samaritan, 176

Ariz. at 505, 862 P.2d at 878. Based on the reasoning set forth in Samaritan, the inescapable conclusion is that the Dixon interview notes are not subject to the attorney-client privilege.

The Samaritan facts are essentially identical in all respects to the facts of this case. The facts of that case were summarized by the court as follows:

> A child's heart stopped during surgery at the Phoenix Children's Hospital at the Good Samaritan Regional Medical Center in 1988. A Good Samaritan lawyer investigated the incident and directed a nurse paralegal to interview three nurses and a scrub technician who were present during the surgery. Each of these Samaritan employees signed a form agreeing to accept legal representation from the Samaritan's legal department. The paralegal summarized the interviews in memoranda that she then submitted to corporate counsel.
>
> The child and her parents brought an action against Phoenix Children's Hospital and the physicians who participated in the surgery, alleging that the cardiac arrest and resulting impairment were caused by the defendants' medical negligence. When deposed two years later, the four Samaritan employees were unable to remember what happened in the operating room. Having learned of the existence of the interview summaries through discovery, Plaintiffs sought their production. Samaritan, a non-party, and Phoenix Children's Hospital resisted, arguing that the interview summaries were protected by the attorney-client privilege and the work product doctrine. The trial court ordered production of the summaries for in camera review. It said it would strike out attorney work product and then release to the plaintiffs those portions of the summaries that would otherwise constitute witness statements. In short, the trial judge treated the documents as though they were not within the corporate attorney-client privilege, but were within the work product doctrine. Samaritan and Children's Hospital filed petitions for special action in the court of appeals, arguing, among other things, that under the rule of Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677, 67 L.Ed.2d 584 (1981), the employee communications summarized in the memoranda were within Samaritan's attorney-client privilege.

26 ALR 5th at 899.

These facts are parallel to the facts at bar. Instead of a medical complications during surgery, this case concerns false information submitted to the NRC following a Site Area

Emergency.[6] In Samaritan, interview notes were prepared and that subsequent to their preparation, the witnesses could no longer recall facts two years later when they were deposed. In the instant matter, Ms. Dixon was deposed some four plus years after the fact and, understandably, is no longer able to recall facts needed by Intervenor to present his case.[7] Thus, the facts here are "on all fours" with the Samaritan facts.

The Samaritan Court then set forth its analysis as follows:

> We agree with the Supreme Court of California that 'the corporation not be given greater privileges than are enjoyed by a natural person' and that we should 'apply to corporations the same reasoning as has been applied in regard to natural persons in reference to [the attorney -client] privilege.'"

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[6] Indeed, the facts in Samaritan are even more compelling because the hospital lawyer investigating the incident obtaining signed forms where the individuals agreed to accept legal representation from the Samaritan's legal department. Georgia Power's counsel did not obtain any written agreement for representation.

[7] Georgia Power's assertion that Intervenor should have undertaken discovery in addition to deposing Ms. Dixon is nonsensical. If Georgia Power is asserting that it could review the notes and state what is in them in responses to written discovery, then the notes cannot be subject to the attorney-client privilege because Georgia Power's counsel would be releasing the sum and substance of the notes thereby waiving any claimed privilege. Moreover, Georgia Power previously argued to the Licensing Board that written discovery should not be allowed because Intervenor can obtain the same information via deposition. See Georgia Power's Answer to Intervenor's Motion to Complete Responses to Intervenor's Third Set of Interrogatory Questions and Document Request, dated July 7, 1994. In any event, this argument was rejected by the Licensing Board, see Licensing Board Memorandum and Order (Motion to Compel), dated July 14, 1994. The undisputed fact is that Intervenor conducted the necessary discovery he needed to determine that Ms. Dixon is no longer able to recall essential factual information. Requiring Intervenor to engage in duplicative discovery is an argument that cannot be taken seriously.

It should be noted that Georgia Power reliance on Arcuri v. Trump Taj Mahal Associates, 154 F.R.D. 97, 104 (D.N.J. 1994) is inappropriate because the facts of that case demonstrate that it is not applicable. The Arcuri court correctly determined that "[i]t is far more appropriate...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." Arcuri v. Trump Taj Mahal Associates. But this case is inapplicable because, due to the passage of time, Ms. Dixon is unable to provide the relevant factual information; resort to the Dixon interview notes is unavoidable.

* * *

The real debate concerning the proper scope of the corporation's attorney-client privilege is its applicability to factual communications made in response to an overture initialed by someone else in the corporation. Unless there is some self-limiting feature, the breadth of corporate activity could transform what would be witness communications in any other context into client communications....

* * *

If 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.

* * *

...Although the employee's presence, and hence the employee's knowledge, is a function of his or her corporate employment, the employee bears no other connection to the incident. The employee did not cause it. His actions did not subject the corporation to possible liability. When this employee speaks, it is not about his or her own actions, but the actions of someone else...

* * *

We therefore hold that, where someone other than the employee initiates the communication, a factual communication by a corporate employee to corporate counsel is within the corporation's privilege if it concerns the employee's own conduct within the scope of his or her employment and is made to assist the lawyer in assessing or responding to legal consequences of that conduct for the corporate client. This excludes from the privilege communications from those who, but for their status as officers, agents or employees, are witnesses.

We believe that this is the appropriate place to draw the line. It has all the advantages of a narrow reading of Upjohn...

* * *

Applying our test to the facts of this case, we conclude that the statements made by the nurses and scrub technician to samaritan's counsel are not within Samaritan's attorney-client privilege. These employees were not seeking legal advice in confidence. The initial overture was made by others in the corporate. Although the employees were present during the operation, their actions did not subject Samaritan to potential liability. Their statements primarily concerned the events going on around them and the actions of the physicians whose alleged negligence caused the injuries. These statements were not gathered to assist Samaritan in assessing or responding to legal consequences of the speaker's

> conduct, but to the consequences for the corporation of the physician's conduct. Thus, these Samaritan employees were witnesses to the event, and their statements are not within the attorney-client privilege.

Samaritan, 26 ALR5th at pp. 904-911.

Taking into consideration the fact that an "employee's connection to the liability-causing event [may be] too attenuated to fit the classical model of what it means to be a client," the Samaritan Court refined the Upjohn decision and corrected the inherent flaws associated with the "control group" test which Upjohn overturned. Id. at 505, 862 P.2d at 878.

The Samaritan decision is applicable to the case at bar.[8] As in Samaritan, the interview notes came from nurses and technicians who witnessed an operation alleged to have caused injury to a child; here the notes come from a secretary who witnessed events related to the preparation of presentation materials at the center of whether Georgia Power misled the NRC. In Samaritan, the passage of time prohibited the individuals from recalling facts; in this case the passage of time prohibits Ms. Dixon from recalling facts associated with her production of presentation materials; in Samaritan, the individuals had no individual liability; in this matter Ms. Dixon has

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[8] The facts and analysis are so identical that, if Georgia Power is substituted for Samaritan, and Ms. Dixon for the nurses and technician, the Samaritan decision is congruent with the Licensing Board's reasoning and decision to release the Dixon notes. Indeed, making these changes would result in the conclusion of Samaritan to read as follows:

> Applying our test to the facts of this case, we conclude that the statements made by [Ms. Dixon] to [Georgia Power's] counsel are not within [Georgia Power's] attorney-client privilege. [Ms. Dixon was] not seeking legal advice in confidence. The initial overture was made by others in the corporate. Although [Ms. Dixon was] present during the [preparation of presentation materials, her] actions did not subject [Georgia Power] to potential liability. [Her] statements primarily concerned the events going on around [her] and the actions of the [managers] whose alleged negligence caused the [submission of false information to NRC]. These statements were not gathered to assist [Georgia Power] in assessing or responding to legal consequences of the speaker's conduct, but to the consequences for the corporation of [management's] conduct. Thus, [Ms. Dixon was a] witness[] to the event, and [her] statements are not within the attorney-client privilege.

no independent liability. In Samaritan, the individuals were fact witnesses; in this case Ms. Dixon appears solely as a fact witness. In Samaritan the individuals were not seeking legal advice in confidence; the same is true with respect to Ms. Dixon.

Applying the Samaritan reasoning was not unreasonable and the Commission should deny Georgia Power's appeal.

B. THE LICENSING BOARD'S ORDER ALLOWING DISCOVERY OF WORK-PRODUCT WAS BASED UPON A PROPER SHOWING OF NEED AND HARDSHIP

It is well settled that the party resisting discovery on the basis of attorney-client privilege bears the burden of establishing that the privilege exists. U.S. v. Davis, 131 F.R.D. 391, 402 (S.D.N.Y. 1990); Fisher v. U.S., 425 U.S. 391 (1976). The modern work product doctrine, described by the Supreme Court in Hickman v. Taylor, grants attorneys a sphere of privacy within which "to prepare his legal theories and plan his strategy without undue and needless interference." Hickman v. Taylor, 329 U.S. 495, 510-511 (1947). The party seeking discovery must establish that disclosure is warranted. "[R]elevant, non-privileged facts may be discovered from an attorney's files where their production is essential to the opponent's preparation of its case." In re: Six Grand Jury Witnesses, 979 F.2d 939, 944 (1992).

As Georgia Power noted, work product includes ordinary work product, which is generally afforded qualified immunity (subject to a showing of substantial need and undue hardship), and opinion work product (consisting of an attorney's mental impressions and legal theories), which merits special protection. U.S. v. Horn, 811 F.Supp. 739, 745 (1992). The Licensing Board considered Ms. Dixon's inability to recall the contents of the interview notes, determined that no means to obtain the equivalent information existed, and -- after careful in

camera review -- 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." Tr. 13154.

Georgia Power correctly notes that the work product doctrine is codified in NRC's rules of Practice at 10 C.F.R. 2.740(b)(2). This regulation is consistent with and derived from Rule 26(b)(3) of the Federal Rules of Civil Procedure. In order to obtain documents ordinarily protected from disclosure under the work product doctrine, a party must satisfy a two part standard:

> [T]he party seeking discovery has substantial need of the materials in the preparation of the party's case 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); Fed.R.Civ.P. Rule 26(b)(3).

A. Intervenor meets the "substantial need" and "undue hardship" parts of the test.

The court in Southern Railway Company v. Lanham, 403 F.2d 119 (5th Cir. 1968), a decision involving a railroad crossing accident followed by the interviews of the Defendant employee witnesses, held that "[g]ood cause is . . . shown for production [of the interviews] because the lapse of time and the employment relationship strongly suggest that the full and accurate disclosure of facts...could not be accomplished through other means." Id. at 129.

The F.R.C.P. 26, Notes of Advisory Committee on Rules, 1970 Amendment declared that Lanham "set forth as controlling considerations the factors contained in the language of this subdivision [(b)(3) of Rule 26]." Subdivision (b)(3)--Trial Preparation: Materials; See Teribery v. Norfolk & Western Railway Co., 68 F.R.D. 46, at 48 (1975). The analysis of the Lanham court provides the basis to determine whether witness statements are discoverable: i) The witness may have a lapse of memory; or ii) he may probably be deviating from his prior statement; or iii) he may be reluctant or hostile; or iv) he may have given a fresh and contemporaneous account in a

written statement while he is available to the party seeking discovery only a substantial time thereafter. F.R.C.P. 26, Notes of Advisory Committee on Rules, 1970 Amendment; See also Hamilton v. Canal Barge Company, Inc., 395 F.Supp. 975, at 977 (1974).

The facts in the instant case demonstrate that all four of the independent circumstances provided in Lanham require production of the Dixon notes.

1) The witness may have a lapse of memory

During Ms. Dixon's 1994 deposition, she claimed not to recall the events in question, specifically the date she typed the Cash list. Dixon Deposition. Dixon Dep. p 11, li 19-20; p. 17. li. 19-22; p. 13, li 11-12.

2) The witness may be deviating from his prior statement

With respect to the preparation of the Cash List, Ms. Dixon's June 9, 1995 testimony before the ASLB directly contradicts her prior deposition testimony. Previously she could not recall when she typed the Cash list. Compare Tr. 8111 and Dixon Dep. pp. 11, 13, 17.

3) The witness may be reluctant to answer questions

During her deposition Ms. Dixon failed to answer numerous questions during her 1994 deposition taken by Intervenor's Counsel and specifically asserted that she could not recall over thirty times. Yet, at the ASLB hearing, she could provide answers to numerous questions to which she was previously unable to respond. Moreover, Ms. Dixon would not appear without a subpoena. This course of conduct indicates a reluctance on the part of the witness to answer questions.

4) The witness may have given a fresh and contemporaneous account where party seeking discovery was only able to obtain an equivalent statement a substantial time thereafter

In the instant matter, the account given by Ester Dixon was made some two years prior to her deposition and some three years before she appeared before the ASLB and presented testimony contradictory to her earlier deposition. According to Mr. Lamberski, Ms. Dixon had a clear recollection of the list at the time of the 1992 interview. Tr. 4616.

These events provide evidence of Ms. Dixon's memory lapse, deviation from prior testimony, and reluctance to answer questions, and demonstrate good cause for the production of the interview notes.

The facts in this case also parallel Young v. United Parcel Service, 88 F.R.D. 269 (1980). In Young, the defendant's employees witnessed a slip-and-fall accident and were interviewed ten or eleven months later. The Court declared that "[t]wo factors lead...to the conclusion that Plaintiffs have met the substantial need/undue hardship requirement." Id. at 271. The two factors considered were that statements given by the witnesses "differed significantly" and that the witnesses were employees of the Defendant. Id. at 271.[9]

The case at bar parallels Young on both aspects of the requisite showing. First, the interview notes should indicate a contradiction between Ms. Dixon's testimony before the

[9] In Young, Plaintiffs claimed damages as a result of Plaintiff Wilma Young's slip and fall at Defendant's place of business. Young, 88 F.R.D. at 270. Statements were taken from three of defendant's employees approximately ten or eleven months after the accident. Id. at 270. Plaintiff's attorney alleged that the insurance adjuster who conducted the interviews of Defendant's employees stated that the witnesses mentioned something about oil being spilled on the floor of Defendant's premises prior to Ms. Young's fall. Id. at 270. However, during depositions, all three employees testified that they could not recall telling the insurance adjuster that oil had spilled. Id. at 270.

Licensing Board and her earlier deposition testimony. Second, Ms. Dixon has continuously been employed by Georgia Power.

C. THE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES SHOULD NOT APPLY TO THE DIXON NOTES BECAUSE GEORGIA POWER EMPLOYED TROUTMAN SANDERS TO PERFORM A MANDATORY BUSINESS FUNCTION WHICH RENDERS THE WORK PERFORMED BY TROUTMAN SANDERS NON-PRIVILEGED.

A company cannot hide facts from a tribunal based merely on the fact that a lawyer participated in a business decision because to do so would mean that "any inquiry into a decision made by a company would be privileged where the decision was based upon legal advice. This is plainly an unwarranted extension of the privilege." Cuno, Inc. v. Pall Corp., 121 F.R.D. 198, 204 (E.D.N.Y.). In this respect no privilege applies to information and documents obtained by lawyers who are essentially performing a business function of the corporation. U.S. v. Davis, 131 F.R.D. 391, 401 (S.D.N.Y. 1990). In re Grand Jury Subpoena Duces Tecum dated September 15, 1983, 731 F.2d 1032, 1037 (2nd Cir. 1984). This doctrine in the corporate setting is well established because an "attorney's law degree and office does not create a privilege sanctuary for corporate records." Research Institute for Medicine and Chemistry, Inc. v. Wisconsin Alumni Research Foundation, 114 F.R.D. 672, 676 (W.D.Wisc. 1987).

The courts have recognized that a significant public interest is served by excluding the application of the attorney client privilege where a duty of full disclosure to a government entity exists. See Hercules Inc. v. Exxon Corp., 434 F.Supp. 136, 143 (1977)(citing In re Natta, 410 F.2d 198 (3rd Cir. 1969)("There is a legitimate public interest in insuring that the applicant is not able to circumvent his duty of full disclosure to the [U.S.] Patent Office merely by channeling information into the hands of an attorney"). Similarly, in Burroughs Wellcome Co. v. Barr Laboratories, Inc., 143 F.R.D. 611 (E.D.N.C. 1992), the court considered whether the attorney-

client privilege should apply to technical information obtained by the attorney. The court concluded that "technical information communicated to the attorney but not calling for a legal opinion or interpretation and meant primarily for aid in completing patent applications" was "not protected by the attorney-client privilege." Id., at p. 615. In Sneider v. Kimberly-Clark Corp., 91 F.R.D. 1 (1980), the Court observed that "it is incumbent upon the courts to be wary of attempts to insulate the corporation from making disclosures which would ordinarily be required of an individual client." Id., at p. 5. The Sneider court goes on to explain:

> The touchstone of the attorney-client privilege is that the communications only are privileged, not any underlying facts or data.... To sustain the privilege with regard to [confidential research information] would permit the attorney to function as a mere conduit and would impermissibly insulate the corporation from disclosure of non-legal, technical data. With respect to all documents falling within this category, the attorney-client privilege will not apply.

Sneider v. Kimberly-Clark Corp., 91 F.R.D. 1, 5 (1980).

The facts in this case compel disclosure of the interview notes because Georgia Power employed Troutman Sanders to investigate facts associated with the submission of false information concerning diesel starts. Indeed, the record establishes that Georgia Power relied upon its lawyers to investigate, verify and draft Georgia Power's response to the Notice of Violation ("NOV") issued by NRC Staff. According to Mr. Hairston:

> [W]e went through a three year period where we really asked not to talk about some of this. And it was only through me trying to explain to you how I tried to keep touch to make sure there wasn't something in there that I needed brought to my attention that I did need to act on as a manager. But it's given the guidelines that we were under and advised by out attorneys not to be discussing this with each other [communication with the attorneys] was the only option I had available to me [to function in a managerial capacity]."

T. 9339 (Hairston).[10] Moreover, when asked "Did you undertake personally any factual investigation to determine the veracity of any aspect of this conclusion [of the NRC's Office of Investigations report]?", Mr. Hairston further explained:

> I have a team of lawyers working on this and other issues for five years or almost five years that has exhaustedly looked at the record. As I testified earlier today, I have periodically asked the question have you seen anything that was deliberately done wrong that was just totally out -- those type of questions. And the feedback from this -- what I consider to be very, very competent team of attorneys has always been nothing that would lead me to believe that the general tone and specifics and this whole section here are correct.

T. 9337-8 (Hairston).

Other than Georgia Power's attorneys, no entity associated with Georgia Power was equipped to perform this function. Georgia Power's decision not to entrust its licensing group to draft or verify the NOV response placed the business responsibility of complying with 10 C.F.R. 50.9 with Troutman Sanders. Indeed, the record indicates that Georgia Power went so far as to institute a policy that individuals were not to discuss matters pertaining to the issues in this proceeding amongst themselves and required that all factual information be funnelled to its attorneys on an individualized basis. The interview notes and other underlying documentation lost their privileged status when Georgia Power determined that its attorneys would perform the business function of drafting and verifying factual information contained in the NOV response -- a function historically performed by the plant Vogtle licensing group.

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[10] In addition to Mr. Hairston, the current chair of the plant Vogtle Plant review Board ("PRB"), Mr. Skip Kitchens, testified that the NOV response was obtained from Georgia Power's counsel; that Georgia Power's counsel attended the PRB meeting; that Georgia Power's counsel undertook the responsibility of incorporating PRB comments. (Kitchens Dep.)(Untranscribed). Additionally, Mr. Beasley, the current plant manager, testified that the comments of the PRB were given to a Troutman Sanders attorney for incorporation into the NOV response and that Troutman Sanders had the responsibility of forwarding the finalized NOV response to the plant General Manager. See Beasley Deposition. at p. 9 (Appended to Intervenor's July 24, 1995 Supplemental Motion to Compel Interview Notes).

Pursuant to 10 C.F.R. 50.9, Georgia Power must take steps to determine that its communications with the NRC are complete and accurate in all material respects. With respect to the NOV response, Georgia Power determined that its lawyers should perform this function. Under these circumstances, allowing Georgia Power to conceal the underlying factual data available to the organization responsible for drafting the NOV response "would permit the attorney to function as a mere conduit and would impermissibly insulate the corporation from disclosure of non-legal, technical data." Sneider v. Kimberly-Clark Corp., 91 F.R.D. 1, 5 (1980).

The utilization of attorneys to comply with 10 C.F.R. 50.9 obligations of a licensee is an important issue which the Commission should consider. If the Commission allows a licensee to use lawyers to investigate and respond to a notice of violation, then the Commission should not allow that licensee to erect wall of privilege as to the facts uncovered during the investigation. To do so will allow result in selective disclosure of factual information (i.e., facts would be grouped into privileged and non-privileged categories and the licensee could exclude as "privileged" all aspects of the factual investigation that turned up information contrary to the licensee's position). A licensee would never again be subject to a finding of intentional withholding of material information because whether or not the persons responsible for verifying and drafting the communication knew of the information would be concealed under the cloak of attorney-client privilege.

In sum, the decision to employ lawyers to perform the essential and necessary business function of complying with 10 C.F.R. 50.9 in written correspondence with NRC necessarily excludes from the "attorney-client" privilege all factual information obtained by the lawyers that can be considered necessary to determine whether the correspondence complied with 10 C.F.R. 50.9.

D. INTERLOCUTORY REVIEW IS INAPPROPRIATE IN THIS CASE

1. The Licensing Board's Order Does Not Threaten Georgia Power With Immediate and Serious Irreparable Impact

Georgia Power will not be irreparably injured by being required to turn over the Dixon interview notes, which the Board has reviewed in camera and determined to contain only factual information, rather than mental impressions or legal theories. Furthermore, "[b]oth common law principles embodied in the attorney-client privilege and the work product doctrine are to be applied in a common sense way in light of reason and experience as determined on a case-by-case basis." In re: Six Grand Jury Witnesses, 979 F.2d at 944.

2. The Licensing Board's Order Will Not Affect the Outcome of the Proceeding or Cause Undue Delay

Georgia Power's concern that Intervenor will use the Board's ruling as precedent to invade other privileged attorney-client communications is unwarranted. The record in this proceeding is closed with the exception of specific matters identified on the record by the parties on September 28, 1995. Finally, it is Georgia Power's petition for interlocutory review (not the Board's disclosure order) which threatens to unduly delay the proceedings.

Interlocutory appeals are subject to the clearly erroneous standard of review. As the Chadbourne Court succinctly stated:

> If, however, the claimed privilege does not appear as a matter of law, but presented a question of fact, then the determination of the trial court may not be set aside. When the facts, or reasonable inference from the facts, shown in support of or in opposition to the claim of privilege are in conflict, the determination of whether the evidence supports one conclusion or the other is for the trial court, and a reviewing court may not disturb such finding if there is any substantial evidence to support it.

Chadbourne, 60 Cal. 2d at 728.

It is in the public's best interest to deny Georgia Power's petition for interlocutory review. Because the attorney-client privilege may present "an obstacle to the investigation of the truth, (it) ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." Hydraflow, 145 F.R.D. 626, 632. There is no overriding public interest to protect disclosure after a licensing board has carefully reviewed the underlying facts and determined that the document in question is not privileged.

III. CONCLUSION

For all of the reasons stated above, Intervenor respectfully requests that Georgia Power's petition for interlocutory review of the Licensing Board's order to produce the Dixon interview notes be denied.

Respectfully submitted,

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Dated: October 2, 1995

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that the attached document has been served by hand-delivery on October 3, 1995 on the persons identified in the attached list.

By: Mary Jane Wilmoth

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