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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Peter B. Bloch, Chair
Dr. James H. Carpenter
Thomas D. Murphy

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

RESPONSE TO LICENSEE'S MOTION FOR RECONSIDERATION REGARDING THE NOTES OF THE ESTER DIXON NOTES AND BRIEF ON ATTORNEY CLIENT PRIVILEGE

Intervenor Allen Mosbaugh hereby responds to Licensee's Motion for Reconsideration and hereby resubmits his request to this honorable Board to compel Licensee to provide the parties with the interview notes of Ester Dixon. Intervenor also takes this opportunity to address the Board's questions concerning attorney client privilege with regard to the issue that arose in the examination of Mr. Ajluni.

I. ARGUMENT

The record supports a ruling by this Board to compel Georgia Power to release the interview notes of Ester Dixon. The attorney-client privilege does not attach to Ms. Dixon because application of the privilege would not advance the underlying purposes of encouraging candid communication between client and

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counsel. As discussed below, the interview notes constitute business records and business advice outside the scope of attorney-client and attorney work product privileges. Furthermore, the privilege does not apply to information and documents obtained by lawyers who are essentially performing a business function of the corporation.

A. THE ATTORNEY-CLIENT AND ATTORNEY WORK PRODUCT PRIVILEGES DO NOT APPLY TO INTERVIEW NOTES BECAUSE THE ATTORNEYS WERE PERFORMING A BUSINESS FUNCTION.

Licensee, Georgia Power has not met its burden of establishing that an attorney-client privilege exists with respect to Ester Dixon. It is well settled that the party resisting discovery on the basis of attorney-client privilege bares 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). 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).

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). 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. at 401;

In re Grand Jury Subpoena Duces Tecum dated September 15 83, 731 F.2d 1032, 1037 (2d Cir. 1984). 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 another patent case, 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 the area of patent law, it was explained in Sneider v. Kimberly-Clark Corp., 91 F.R.D. 1 (1980) that

> 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 of Ester Dixon who was a "fact witness" interviewed during the course of the investigation of air quality and diesel generator issues. The record establishes that GPC relied upon its lawyers to investigate, verify and draft the NOV response and ensure that it was complete and accurate in all material respects. In this respect, Mr. Hairston testified:

> [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 our 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]."

TR. 9339 (Hairston).[1] Moreover, when asked "Did you undertake personally any factual investigation to determine the voracity of any aspect of this conclusion [of the OI 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

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[1] In addition to Mr. Hairston, the current chair of the plant Vogtle PRB, Mr. Skip Kitchens, testified that the NOV response was obtained from GPC's counsel; that GPC's counsel attended the PRB meeting; that GPC'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 Dep. at p. 9. Excerpts of Mr. Beasley's deposition are appended at the end of this brief.

> 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.

TR. 9337-8 (Hairston).

Other than GPC's attorneys, it appears that no one else at GPC was equipped to perform this function. GPC'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 on GPC's counsel. Indeed, the record indicates that GPC went so far as to instituted 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 GPC 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.[2]

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[2] Intervenor also asserts this argument respect to Georgia Power's Response to Intervenor's First Request for admissions. In that instance Mr. Mark Ajluni worked together with Mr. Tom Penland of Troutman Sanders in completing the response.

Mr. Ajluni testified on August 10, 1995 that he was not seeking legal advice such as interpreting regulations while working with Mr. Penland on the response to the NOV but that they focused more on the work product. Tr. 10812. He further testified regarding his relationship with Mr. Penland in working on the response to admissions in the following matter : " You know: Here's -- here's these allegations. We need to verify can we, you know, admit or deny, or neither admit nor deny: and, you know, what is our factual basis for answering these things." Tr. 10812.

The courts have recognized th[illegible] 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.

> 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.

Hercules Inc. v. Exxon Corp., 434 F.Supp. 136, 143 (1977)(citing In re Natta, 410 F.2d 198 (3rd Cir. 1969).

[fn.2 cont.]
Mr. Ajluni also testified that there was no discussion with Mr. Penland or any of Licensee's counsel regarding the attorney client relationship as to the response to admissions but he had been on other issues like the DCL proceedings. Tr. 10811. He stated that he felt there was an attorney-client privilege because of his involvement in other issues. Tr. 10811. When describing his work on the response [redacted] he testified as follows:

[by Stephen Kohn]
Q Other than Mr. Penland, did you work with anybody else to gather facts and information to put this together?

A I believe I did it all myself. If you notice the -- when you look at it, you can see where we referenced particular evidentiary findings or taped transcripts, and so we were able to use that kind of information to answer the questions.

Q And when you say "we," you're referring to Mr. Penland and yourself?

A That's correct.

Q Okay.

[fn. 2 cont.]
Tr. 10816. The fact that Mr. Ajluni and Mr. Penland worked closely together in gathering and verifying the factual information in the request for admissions, and the fact that Mr. Ajluni could not recall receiving any legal advice with regard to the admissions, demonstrates that Mr. Penland was not working in his capacity of Licensee's counsel but was performing a business function of the corporation.

Pursuant to 10 C.F.R. 50.9, GPC 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, GPC determined that its lawyers should perform this function. Under these circumstances, granting GPC the right 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. at 5.

This issue affects the future ability of the NRC to ensure licensees compliance with 10 C.F.R. 50.9. Once the NRC permits non-disclosure of the underlying factual data when a licensee employed a lawyer to draft and verify the accuracy of important communications to the NRC, a permanent mechanism allowing the concealment of "privileged" factual information known to the attorney will be established, i.e., selectively disclosing facts deemed non-privileged while withholding "privileged" factual information. 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 cloaked under the 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.

B. EVEN IF THE ATTORNEY-CLIENT PRIVILEGE APPLIED TO ATTORNEY INTERVIEW NOTES, CURRENT LEGAL JURISPRUDENCE EXCLUDES FROM THAT PRIVILEGE INTERVIEW NOTES OF THE ENTIRE CLASS OF EMPLOYEES WHO CAN BE DESCRIBED AS "WITNESSES" WITHOUT INDEPENDENT LIABILITY.

It has been observed that "the application of the attorney-client and work product privileges to licensing proceedings is an unsettled issue of law." Boughton v. Cotter Corp., 10 F.3d 746, ___ (10th Cir. 1993). In Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677, 65 L.Ed2d 584 (1981), the Supreme Court rejected the "control group test" when confronting what constitutes privileged communications by a lawyer and his or her corporate client. The Supreme Court declined, however, "to lay down a broad rule or series of rules to govern all conceivable future questions in this area." Id., at 386, 101 S.Ct. at 681. See Samaritan Foundation v. Goodfarb, 176 Ariz 497, 862 P.2d 870, 26 ALR 5th 893, 911 (1993).

In Samaritan, the Supreme Court of Arizona, after careful review of federal and state common law principles, announced the application of the attorney-client privilege in the corporate setting. The facts of that case were summarized by the court as follows:

> A child's heart stopped during surgery at the Phoenix Children' 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...Having learned of the existence of the interview summaries through discovery, Plaintiffs sought their production....

26 ALR 5th at 899.

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.'"

* * *

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 initiated 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 ALR 5th at pp. 904-911.

Applying the sound reasoning outlined in Samaritan, the interview notes of Ester Dixon would clearly fall outside the attorney-client privilege. Ms. Dixon was merely a witness to the events occurring during the production of presentation materials

prepared prior to April 9, 1990; she had no independent liability and merely volunteered factual information that was reduced to interview notes. Clearly, these notes do not constitute attorney-client communications and the Board should order there disclosure.

II. Conclusion

For the foregoing reasons, this Board should order the immediate production of the interview notes of Ester Dixon and issue an order requiring Licensee to list the date and time of each and every witness statement obtained prior to date, along with the identity of the attorney who prepared the witness interview notes. Intervenor should thereafter be granted an opportunity to seek additional interview notes or statements the Board determines not to be privileged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the above document has been served on the persons listed in the attached service list via hand delivery this 15 day of August, 1995 except as indicated by "*" in which case it was served by first class mail.

Mary Jane Wilmoth

UNITED STATES OF AMERICA
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ATOMIC SAFETY AND LICENSING BOARD

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