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August 18, 1995

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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,	)	
Units 1 and 2)	)	ASLBP No. 93-671-01-OLA-3

GEORGIA POWER COMPANY'S MEMORANDUM OF LAW ON THE ATTORNEY-CLIENT PRIVILEGE

Georgia Power Company ("Georgia Power"), pursuant to the Board's August 10, 1995 request, hereby submits this Memorandum of Law on the applicability of the attorney-client privilege to communications between counsel for Georgia Power and two Georgia Power employees, Ester Dixon and Mark Ajluni, the disclosure of which has been sought by Intervenor. Because the Dixon and Ajluni communications were confidential attorney communications with employees concerning matters within the scope of their duties, and were made in order for Georgia Power to obtain legal advice, they meet the standard set forth in Upjohn for application of the attorney-client privilege, and are thus protected from disclosure.

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Background

During Mr. Ajluni's August 10, 1995 testimony before the Board, Intervenor sought the disclosure of communications between Mr. Ajluni and counsel for Georgia Power that occurred during the preparation of Georgia Power's responses to Intervenor's requests for admissions in this proceeding. Georgia Power objected to the disclosure of such communications on the basis that they were absolutely privileged attorney-client communications. Tr. 10801, 10803, 10805-07, 10810-11, 10814-17 (August 10, 1995).

The Board ruled correctly that "the attorney/client privilege is absolute when it attaches," and that "there is no balancing test when it attaches" absent unusual circumstances not present here. Thus, the Board ruled that it was "going to uphold the attorney/client privilege in this instance." Tr. 10820 (August 10, 1995). At the same time, the Board requested the following:

> more specific briefing on when the attorney/client privilege attaches in federal cases, subsequent to Upjohn because there was a suggestion in the Upjohn case that there's some decision in attaching the privilege as to whether or not the purpose of the attorney/client privilege is served in that particular instance. And I really could use the help of my brother Judges as to how they have addressed that suggestion within the Upjohn case. Once the privilege attaches, there's no question, it's absolute. But whether or not it attaches in all cases where an attorney is working with someone about a legal matter is not as clear to me. And I will want help on that, both with respect to the Ester Dixon question and the current one, and the decision in the Ester Dixon case presents some of the special factors that we would like to have some guidance from common law on.

Tr. 10820-21.

Subsequent to the August 10, 1995 proceeding, Intervenor filed his "Response to Licensee's Motion for Reconsideration Regarding the Notes of the Ester Dixon Notes and Brief on Attorney Client Privilege" ("Response").[1] The issue of the Ester Dixon notes has twice been previously briefed by Georgia Power.[2]

Discussion

Upjohn Does Not Require a Separate Inquiry to Determine Whether Application of the Attorney-Client Privilege Is Consistent with the Privilege's Purpose

Under the Supreme Court's holding in Upjohn Co. v. United States, 449 U.S. 383 (1981), the attorney-client privilege applies to attorney-client communications whenever the following criteria are met:

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.

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[1] Apart from a brief discussion of the attorney-client privilege as applied to communications between counsel for Georgia Power and Mr. Ajluni (see Response at n.2), Intervenor's Response is a virtually verbatim copy of Intervenor's July 24, 1995 "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." Georgia Power has previously addressed the issues contained in the Supplemental Motion in its August 8, 1995 Opposition to Intervenor's Supplemental Motion, and will therefore not repeat those arguments here. Needless to say, Intervenor fails to address any of the arguments made in Georgia Power's Opposition. In particular, Intervenor fails to respond to Georgia Power's argument that Intervenor is seeking to impermissibly reopen discovery and renewing document requests previously denied by the Board. Accordingly, the Supplemental Motion should be denied.

[2] "Georgia Power Company's Response to Intervenor's Motion to Compel Production of Licensee's Notes of Interview with Ester Dixon" (July 17, 1995), and "Georgia Power Company's Opposition to 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" (August 8, 1995).

5. The communications were considered confidential when made and kept confidential.

449 U.S. at 394-95. The holding in Upjohn, however, does not require any further consideration that the purposes underlying the attorney-client privilege be satisfied as a precondition for the application of the privilege. It is satisfaction of the Upjohn factors that determines that the purpose underlying the attorney-client privilege is satisfied. The case-by-case analysis contemplated by Upjohn is only to determine that the Upjohn factors are satisfied. Georgia Power's Motion for Reconsideration at 4 n.2.

Cases decided by other federal courts subsequent to Upjohn support the conclusion that the inquiry into whether the attorney-client privilege applies does not involve consideration, beyond the Upjohn factors, of whether such application would be consistent with the purpose of the privilege. See Admiral Insurance Co. v. U.S. District Court for the District of Arizona, 881 F.2d 1486, 1492 (9th Cir. 1989) (applying Upjohn factors but making no purpose inquiry); Command Transportation, Inc. v. Y.S. Line (USA) Corp., 116 F.R.D. 94, 95-96 (D. Mass. 1987) (applying same Upjohn factors but making no purpose inquiry); Baxter Travenol Laboratories, Inc. v. Lemay, 89 F.R.D. 410, 413-14 (S.D. Oh. 1981) (applying same Upjohn factors but making no purpose inquiry); see also Milroy v. Hanson, 875 F. Supp. 646, 650 (D. Neb. 1995) (policy arguments regarding the attorney-client privilege are irrelevant); Rhone-Poulenc Rorer Inc. v. Home Indemnity Co., 32 F.3d 851, 864 (3d Cir. 1994) ("As the attorney client privilege is intended to assure a client that he or she can consult with counsel in confidence, finding that confidentiality may be waived depending on the relevance of the communication completely undermines the interest to be served.").

There appears to be only one case decided after Upjohn -- Delco Wire & Cable, Inc. v. Weinberger, 109 F.R.D. 680, (E.D. Pa. 1986) -- in which a court has mentioned the need to consider the purpose of the attorney-client privilege in determining its applicability. However, that position is clearly not a correct statement of the law:

> Delco Wire . . . created another proof requirement that is not an element of the privilege. "[A] claim of privilege must be substantiated by reasons for preserving its confidentiality." This Delco Wire proof factor focused on tying the privilege assertion to the policies of the doctrine. . . . Most cases do not require this factor as an element necessary for establishing the privilege.

John William Gergacz, Attorney-Corporate Client Privilege 3-11 (2d ed. 1990) (emphasis added). Indeed, Georgia Power has found no case in which a court has determined that the five criteria enumerated in Upjohn were present (and that none of the exceptions -- e.g., fraud, wrongdoing -- or waiver were present) but refused to apply the privilege on the basis that it would not be consistent with the privilege's purpose.

Communications Between Counsel for Georgia Power and Mr. Ajluni Are Protected from Disclosure Under the Attorney-Client Privilege

Intervenor argues in his Response that communications between Mr. Ajluni and counsel for Georgia Power in the course of preparing Georgia Power's response to Intervenor's First Request for Admissions "lost their privileged status when GPC determined that its attorneys would perform the business function of drafting and verifying factual information contained in [Georgia Power's response to Intervenor's First Request for Admissions]." Response at 5. Intervenor concludes that:

> 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.

Response at 6 n.2.

It is ludicrous for Intervenor to suggest that responding to a request for admissions as part of a contested NRC proceeding is a business function. Georgia Power is not in the "business" of litigating; it is in the business of operating a nuclear power station.

> [T]he key from the cases is not to focus on what the lawyer is doing, but to inquire in what context it is being done. If the act is being done for its own sake or for a purpose unrelated to law, the lawyer is not acting as a lawyer. . . . However, if the act is done as an adjunct to giving legal advice or performed for the value that legal analysis can bring, the lawyer is acting as a lawyer. . . .
>
> 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."

Gergacz, Attorney-Corporate Client Privilege at 3-18-19 (citations omitted).

Responding to a discovery request is precisely the type of function in which a lawyer's legal skills are necessary. The lawyer is needed to understand exactly what is being asked, whether the information available to the client is sufficient to admit, deny or neither admit nor deny, and whether a request is objectionable. These are clearly not business functions. The mere fact that

factual investigation may be involved in a legal task does not turn that task into a business function and thereby render associated attorney-client communications not entitled to protection from disclosure.

> [C]ommunications engaged in for the purpose of obtaining and providing "advice" or "opinion" are protected, and may, on the attorney's part, constitute 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.

Arcuri v. Trump Taj Mahal Associates, 154 F.R.D. 97, 104 (D.N.J. 1994).

Courts have recognized that responding to discovery is a task in which legal skills are particularly involved. Consequently, it has been held that communications arising out of the process of preparing responses to discovery are protected under the attorney-client privilege. See, e.g., Frey v. Department of Health and Human Services, 106 F.R.D. 32, 38 (E.D.N.Y. 1985) (approving plaintiff's counsel's questioning defendant's employees regarding any relevant facts underlying defendant's responses to discovery, but not asking any questions about communications the employees made to defendant's counsel in the case). Similar concerns compel the protection of Mr. Ajluni's communications with counsel for Georgia Power during the preparation of responses to

the Request for Admissions here. The following noteworthy admonition from the Supreme Court in Upjohn bears repeating in this context:

> While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege. As Justice Jackson noted in his concurring opinion in Hickman v. Taylor, 329 U.S., at 516, 67 S. Ct., at 396: "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."

449 U.S. at 396.

Communications Between Counsel for Georgia Power and Ms. Dixon Are Protected from Disclosure Under the Attorney-Client Privilege

For the reasons set forth in Georgia Power's previous briefs on the issue of the Ester Dixon notes (see note 2, supra), the communications between counsel for Georgia Power and Ester Dixon, as well as any notes made by counsel for Georgia Power of meetings with Ms. Dixon, are protected from disclosure under the attorney-client and work-product privileges.

Conclusion

For all of the reasons stated above, the Board should determine that the attorney-client privilege applies to the communications between counsel for Georgia Power and Mark Ajluni during the preparation of discovery responses, as well as to notes taken by counsel for Georgia

Power of his meeting with Ester Dixon, and deny Intervenor's requests for the disclosure of these communications.

Respectfully submitted,

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Units 1 and 2)	)	ASLBP No. 93-671-01-OLA-3

CERTIFICATE OF SERVICE

I hereby certify that copies of "Georgia Power Company's Memorandum of Law on the Attorney-Client Privilege," dated August 18, 1995, were served upon the persons listed on the attached service list by deposit in the U.S. Mail, first class, postage prepaid, or where indicated by an asterisk by hand delivery, this 18th day of August, 1995.

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