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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 MOTION FOR RECONSIDERATION OF ORDER REGARDING REQUEST FOR DISCOVERY CONCERNING ESTER DIXON

Georgia Power Company ("Georgia Power") hereby moves for reconsideration of the Board's August 3, 1995 "Memorandum and Order (Request for Discovery Concerning Ester Dixon)" ("Order") to the extent it suggests that Georgia Power's assertion of attorney-client privilege may be outweighed by a showing of need. Georgia Power believes that the Licensing Board has been misled by an inartfully worded statement of law in one of Georgia Power's prior briefs, which the Board appears to now interpret as indicating that the attorney-client privilege is subject to a balancing analysis. If the board is indeed operating under this reasonable misunderstanding, Georgia Power submits that a controlling principle of law had been overlooked, making reconsideration appropriate.[1/]

[1/] A motion for reconsideration is appropriate if "it appears that there is some decision or some principle of law which would have a controlling effect and which has been overlooked . . ." Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 140 (1994).

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The Board's Order calls for an *in camera* inspection of Georgia Power's counsel's notes of a meeting with Ester Dixon in order to determine whether the purposes of the attorney-client privilege are well served by applying the privilege in this instance. Georgia Power respectfully submits that the attorney-client privilege is absolute, and that once the Board determines that the privilege applies no additional inquiries may be made into whether protection of the document advances the purposes of the privilege or outweighs Intervenor's need for the document. If the Board concludes that the attorney-client privilege attaches to Georgia Power's counsel's notes, then the notes are absolutely immune from discovery, and no further inquiry is called for.

Background

On June 30, 1995, Intervenor filed a "Motion to Compel Production of Licensee's Notes of Interview of Ester Dixon," ("Motion to Compel" or "Motion") seeking interview notes taken by Georgia Power's counsel in 1992 while investigating events associated with NRC Office of Investigation and U.S. Department of Justice inquiries related to the March 20, 1990 Site Area Emergency. Tr. 4616 (May 16, 1995). The Parties had earlier provided oral argument on this topic to the Board on June 8, 1995. Tr. 7827-37. Ms. Dixon had been deposed by Intervenor's counsel (Mr. Michael Kohn) on July 20, 1994 and was cross-examined by Intervenor's counsel (Mr. Stephen Kohn) in this proceeding on June 9, 1995. Tr. 8089-8176. Georgia Power filed its response to Intervenor's Motion to Compel ("Response") on July 17, 1995. On August 3, 1995, the Board issued its Order denying Intervenor's Motion to Compel pending an *in camera* review of Georgia Power's counsel's notes to determine whether the purposes of the attorney-client privilege would be well served by applying it in this instance.

Argument

Georgia Power's Counsel's Notes Are Absolutely Protected from Disclosure Under the Attorney-Client Privilege

The Board states in its Order that Upjohn Co. v. U.S., 449 U.S. 383 (1981) requires that:

> each case must be evaluated to determine whether application of the privilege would further its underlying purposes of encouraging candid communications between client and counsel and providing effective representation of counsel.

Order at 4. The Board quoted this statement from the brief filed by Georgia Power in response to Intervenor's "Motion to Compel" in Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-18, 38 NRC 121, 124 (1993). The Board's Order, however, proceeds to discuss the possible need for Georgia Power's counsel's notes of his meeting with Ms. Dixon and the extent to which release of the notes might harm the attorney-client relationship. This discussion leads Georgia Power to believe that the Board has interpreted Georgia Power's earlier brief as indicating that the attorney-client privilege is subject to a balancing test (i.e., that it is a qualified limitation on discovery, like the attorney work product doctrine).

The statement of law in Georgia Power's prior brief was not intended to indicate that the attorney-client privilege is qualified, but rather to reflect the Supreme Court's holding in Upjohn, in which the Court stated:

> Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501. See S. Rep. No. 93-1277, p. 13 (1974) ("the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis") . . . .

> While such a "case-by-case" basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the Rules.

449 U.S. at 396.

The Court in Upjohn envisioned application of this case-by-case analysis only to determine whether a confidential relationship existed establishing the attorney-client privilege.[2/] Upjohn most definitely does not stand for the proposition that tribunals should determine whether, despite the applicability of the privilege, disclosure of the communication should nevertheless be compelled on the basis of the underlying purposes and policies of the privilege or some compelling need by the party seeking discovery. Indeed, the Supreme Court in Upjohn takes pains to emphasize the values of certainty and predictability in determining whether the attorney-client privilege attaches:

> [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying application by the courts, is little better than no privilege at all.

449 U.S. at 393.

Moreover, the Court's analysis in Upjohn clearly demonstrates that the application of the attorney-client privilege is not influenced by the need for the materials by the party seeking disclosure, nor is the privilege subject to a balancing test to determine whether protection of the

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[2/] This entails examining whether the factors considered by the Court in Upjohn as necessary for application of the privilege in the context of a corporate client are met. For an analysis of the application of these factors here, see discussion below.

communication will serve the principles underlying the privilege. The Court in Upjohn merely applied the following five-part factual test to determine . .ether the privilege applied:

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

Upjohn, 449 U.S. at 394-95. At no point did the Court analyze whether, despite the above factors being met, there existed some extraordinary need or overriding purpose that overrode the application of the privilege and compelled disclosure of the communication. Indeed, other cases decided after Upjohn hold that it would be improper to conduct such an analysis: "The attorney-client privilege, if and when attached to a communication (and excepting, of course a valid waiver), is absolute, and there is no 'balance' to be 'tested,' and no 'needs' test, as might be the case with a qualified privilege." Arcuri v. Trump Taj Mahal Associates, 154 F.R.D. 97, 105 (D.N.J. 1994).

The five requirements applied in Upjohn to determine that a communication is protected under the attorney-client privilege are met here. The information known by Ms. Dixon regarding the typing of the Cash List was necessary for Georgia Power's counsel to determine the basis for the April 9 presentation and letter, so that they could advise and represent the Company in connection with the OI investigation and the 2.206 proceeding. Georgia Power's counsel had been

requested to inquire into these matters and to advise superior officers within the company. The information was not available from Georgia Power's "control group" management -- only Ms. Dixon knew of the existence of the typed list in the memorywriter file and was able to recall the typing of the Cash List. The communications concerned matters within the scope of Ms. Dixon's duties -- namely, typing documents for her superiors. Ms. Dixon was aware she was being questioned in order for the Georgia Power to obtain legal advice. See Tr. 8891 (June 9, 1995) (Ms. Dixon: "[Georgia Power's attorneys are] representing the company; I assume they're representing me personally."). Finally, the communications were considered confidential when made and kept confidential. See Georgia Power's Response at 3 ("Both Ms. Dixon and Georgia Power certainly expected that communications between her and Georgia Power's counsel were privileged and confidential."). Therefore, counsel's notes of the meeting with Ms. Dixon should be accorded the absolute protection of the attorney-client privilege.

Of course, the facts underlying the notes of counsel's meeting with Ms. Dixon are not privileged.

> What is protected by the attorney-client privilege is the client's communication with counsel. That particular communication is kept secret. The facts underlying the communication, however, do not become privileged. The discovering party may have access to those facts from any source except the attorney, since that source of information is excluded by virtue of the privilege.

John William Gergacz, Attorney-Corporate Client Privilege 3-41-42 (2d ed. 1990); see also Upjohn, 449 U.S. at 395-96 (the protection of the privilege extends only to communications and not to facts). Georgia Power has never attempted to protect the underlying facts. Intervenor has had two opportunities to discuss those facts directly with Ms. Dixon: at her deposition and during her

testimony at the Hearing. At any point during those two interrogations, Intervenor could have asked Ms. Dixon about her recollection of the events, including whether her recollection of events surrounding the typing of the Cash List had changed since she had spoken with her attorneys, and if so, how it had changed. Intervenor could also have asked Georgia Power, in interrogatories, to describe Ms. Dixon's recollection of the Cash list. Intervenor, however, made no use of these opportunities. Accordingly, Intervenor should not now be able to demand disclosure of privileged communications in order to develop factual information that he declined or failed to pursue in discovery. Facts should be determined by the normal discovery process during the period assigned for discovery, and not by invasion of privileged communications. As the Supreme Court in Upjohn aptly noted,

> [w]hile 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.

The Board Need Not Conduct an *In Camera* Review to Determine that Counsel's Notes Are Absolutely Protected from Disclosure Under the Attorney-Client Privilege

Under the Order, the Board is requiring Georgia Power to "promptly present for *in camera* inspection by this Board its notes of the interview of Ester Dixon conducted by its attorney in 1993." Order at 6. An *in camera* review is not necessary if the Board can determine from the

representations of Georgia Power's counsel and Ms. Dixon that the five factors enumerated in Upjohn for application of the attorney-client privilege are met. See International Paper Co. v. Fireboard Corp., 63 F.R.D. 88, 94 (D. Del. 1974) ("[A] party resisting discovery on the ground of the attorney-client privilege must by affidavit show sufficient facts as to bring the identified and described document within the narrow confines of the privilege. Nor will submitting a batch of documents to the Court *in camera* provide an adequate or suitable substitute because the Court is often without information of what the document concerns or how it came into being or other relevant information which would enable it to determine whether the documents are privileged." (Emphasis in original.)).

A discussion of how the Upjohn factors are met in this instance is set out in the discussion above, as well as in Georgia Power's Response to Intervenor's Motion. The information that is needed from Ester Dixon, as also noted above, is found in her testimony at the hearing before the Board. All of these statements have been made or are being made under penalty of perjury and provide sufficient support -- both factually and in terms of their credibility -- for the Board to determine that the factors required under Upjohn for application of the attorney-client privilege are met.

Should the Board still wish to review Georgia Power's counsel's notes *in camera*, Georgia Power will produce them to the Board immediately. However, if the Board proceeds to examine the notes *in camera*, it should limit its review to a consideration of the five Upjohn factors. If the Board finds that the notes meet those five factors, it should determine that the privilege applies and deny Intervenor's Motion. Upon finding the notes privileged, the Board should not engage in

any additional "needs" or "balancing" tests to determine whether application of the privilege is outweighed by intervenor's need for the materials or otherwise inconsistent with the purposes or principles underlying the privilege. Such an inquiry would be improper under the law of attorney-client privilege as set forth by the Supreme Court in Upjohn.

Conclusion

For all of the reasons stated above, the Board should determine that the notes are absolutely protected by the attorney-client privilege, should abstain from conducting any *in camera* examinations of Georgia Power's counsel's notes of the meeting with Ester Dixon, and should deny Intervenor's Motion.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Georgia Power Company's Motion for Reconsideration of Order Regarding Request for Discovery Concerning Ester Dixon," dated August 8, 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 8th day of August, 1995.

David R. Lewis
Counsel for Georgia Power Company

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