16976

DOCKETED
USNRC
August 8, 1995
'95 AUG 10 P4:06
OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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 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

Introduction

Georgia Power Company ("Georgia Power") hereby opposes "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" ("Supp. Motion"), dated July 24, 1995. This "Supplemental Motion" should be denied because it is an untimely request to re-open discovery which has long been closed in this proceeding, and is merely a renewal of a previous document request that was denied by the Board. Intervenor has not made any showing of "good cause" necessary to reopen discovery. Moreover, the Supplemental Motion seeks information and documents that are protected from discovery by the attorney-client privilege and by the work product doctrine.

9508230317 950808
PDR ADOCK 05000424
G PDR

DS03

Argument

A. Intervenor's Document Requests are an Impermissible Attempt to Reopen Discovery and Renews Document Requests Previously Denied by the Board

Intervenors' Supplemental Motion is yet another attempt to reopen discovery long after discovery closed in this proceeding, and renews document requests that were previously rejected by the Board. Pursuant to the Licensing Board's Memorandum and Order (Request for Extension of Time) dated June 30, 1994, discovery in this proceeding closed on August 8, 1994.

As a preliminary matter, it is not entirely clear what documents Intervenor is requesting. On the first page of the Supplemental Motion, Intervenor requests "interview notes and other documents known to Georgia Power's counsel when preparing Georgia Power's response to the Notice of Violation." In the Conclusion on page 10, Intervenor requests the Board to "order the production of the interview notes of Ester Dixon and issue and order requiring Licensee to list the date and time of each and every witness statement obtained prior to date [sic], along with the identity of the attorney who prepared the witness interview notes."[1/] Intervenor requests further "an opportunity to seek additional interview notes or statements the Board determines not to be privileged." The request in the Conclusion does not limit Intervenor's request to information relating to the Notice of Violation.

[1/] To the extent that Intervenor's Supplemental Motion pertains to the interview notes of Ester Dixon, the Board has ruled that the Supplemental Motion is a "non authorized response" to Georgia Power's Opposition to Intervenor's Motion to Compel and was disregarded by the Board. LBP-95-15, Memorandum and Order (Request for Discovery Concerning Ester Dixon), Aug. 3, 1995. Accordingly, Georgia Power does not address issues relating to the Ester Dixon interview notes in this Opposition, but addresses them instead in a separate Motion for Reconsideration (also being filed on this date).

To the extent that Intervenor now seeks documents relating to Georgia Power's preparation of its response to the Notice of Violation dated May 9, 1994, and the modified Notice of Violation dated February 13, 1995, Intervenor has previously requested such documents, and this request was denied. On February 28, 1995, Intervenor served on Georgia Power document requests directed to Georgia Power and several Georgia Power employees demanding identification and production of all documents relating to the NRC's Notice of Violation (NOV) and the Demands for Information issued in May 1994. Among the documents requested at that time were: all documents "directly or indirectly related to the NOV"; "all correspondence between Georgia Power and any person directly or indirectly related to the NOV"; "all correspondence between Georgia Power and/or its council [sic] and the selected individuals and/or their individual council [sic] directly or indirectly related to the NOV."; "all handwritten notes directly or indirectly related to the NOV and Demands for Information"; and "any documents used in response to or generated as a result of the NRC's Modified Notice of Violation and Proposed Imposition of Civil Penalties". The documents requested in the Supplemental Motion, i.e., documents relating to Georgia Power's preparation of its response to the NOV, are clearly covered by the document requests submitted in February, 1995.

Georgia Power objected to the February document requests at the time they were filed on numerous grounds, including the attorney-client privilege and work product doctrine.[2/] The Board ruled that Intervenor failed to demonstrate good cause to reopen discovery and denied Intervenor's "Motion Requesting an Order Requiring an Immediate Response to Intervenor's

[2/] Georgia Power Company's Opposition to Intervenor's Motion Requesting an Order Requiring Immediate Response to Document Requests, Mar. 28, 1995.

Requests for Documents."[3] Intervenor makes no mention of these facts in the Supplemental Motion.

Intervenor has not shown good cause to reopen discovery or offered any ground for the Board to reconsider its prior ruling. If the Supplemental Motion is granted, the proceedings will be further extended to accommodate Intervenor's document request. The possibility of further delay in the proceeding strongly militates against a reopening of discovery. Cf. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 160-61 (1986) ("good cause" found for reopening discovery; "no indication that the requested discovery would cause a delay in the hearing schedule"). Georgia Power has a right to the end of discovery.[4] See Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), Nov. 9, 1994 slip op. at 3 (motion to reopen discovery denied because "Intervenor has not shown due diligence in protecting his rights" and motion to reopen was "untimely"). Further, as shown below, the documents requested by intervenor are not discoverable in any event because they are privileged.

B. The Documents Requested by Intervenor Are Protected by the Attorney-Client Privilege and Work Product Doctrine

Intervenor seeks documents and information that reflects communications between Georgia Power, Georgia Power personnel, and their counsel. Such communications are protected from discovery by the attorney-client privilege, Upjohn v. United States, 449 U.S. 383 (1981),

---

[3] Memorandum and Order (Motion to Reopen Discovery), slip op. Mar. 30, 1995.

[4] See Draft Systems Inc. v. Alspach, Civ. Action No. 79-1944, 1985 WESTLAW 2813 at 1 (E.D. Pa. Sept. 24, 1985) ("a party has a right to the ultimate end to discovery . . . ."); Resolution Trust Corp. v. Hidden Ponds Phase IV Development Associates, -- F. Supp. -- (E.D. N.Y. 1995) [to be reported at 873 F. Supp. 799], at WESTLAW *5 ("There comes a point in time when discovery must end.")

and by the work-product doctrine. Hickman v. Taylor, 329 U.S. 495 (1947). Contrary to Intervenor's bald assertion concerning application of the privileges to licensing proceedings (Supp. Motion at 7), application of the attorney-client privilege and work product doctrine in NRC licensing proceedings is long standing. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1156-62 (1982); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-70, 18 NRC 1094, 1099-1104 (1983); 10 C.F.R § 2.740(b)(2) (work product privilege).

1. The Requested Documents are Protected by the Attorney-Client Privilege

The documents sought by Intervenor are classic attorney-client communications and, as such, are absolutely privileged. Under the common law privilege attaching to attorney-client communications, all confidential communications between attorney and client are absolutely immune from discovery. See J. Wigmore, Evidence § 2292 (J. McNaughton rev. 1961). The privilege covers documents or other records in which attorney-client communications have been recorded, or which embody such communications. C. McCormick, Evidence § 89 (J. Strong 4th ed. 1992). The privilege extends to employee communications on matters within the scope of their employment and when the employee is being questioned in confidence in order for the employer to obtain legal advice. See Bruce v. Christian, 113 F.R.D. 554, 560 (S.D.N.Y. 1986), Upjohn, 449 U.S. at 394-95.

The purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Upjohn, 449 U.S. at 389. "[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." Id. at 393. "The privilege, when found to exist, is absolute." Arcuri v. Trump Taj Mahal Ass., 154 F.R.D. 97, 101 (D.N.J. 1994).

Georgia Power attorneys assisted the company in responding to the Notice of Violation issued by the NRC on May 9, 1994. The documents requested by Intervenor contain precisely the information contemplated by classic attorney-client privilege. Georgia Power, its employees, and its counsel certainly expected that their discussions concerning the company's response to the NOV and legal strategies in so responding would be protected by the attorney-client privilege. Disclosure of this information would clearly render unpredictable what attorney-client communications are privileged, thereby defeating the policy considerations explained by the Supreme Court in Upjohn.

Intervenor contends (Supp. Motion at 4-7) that the communications among Georgia Power, its employees, and its counsel "lost their privileged status" simply because counsel assisted in drafting the NOV response and in verifying factual information in the NOV response. This contention is baseless. If such a standard were to be adopted, no company could consult with counsel in an enforcement context and expect its communications as to legal strategy to be protected. This would be directly contrary to the policy articulated in Upjohn that application of the privilege be predictable.[5/]

[5/] For the principle that "current legal jurisprudence excludes" certain attorney interview notes from the scope of the attorney-client privilege, Intervenor can muster only a single case decided by the Arizona Supreme Court, Samaritan Foundation v. Goodfarb, 862 P.2d 870 (Ariz. 1993) (Supp. Motion at 7-9). This so-called single case "jurisprudence" is in any event irrelevant because (1) Intervenor's reference to this case appears to relate solely to the Ester Dixon interview notes (Supp. Motion at 9-10) which the Board has disregarded and (2) it is a state court decision, binding only in Arizona, that has no precedential value to this federal tribunal which is not applying state law; see Fed. R. Evid. 501.

As the Board previously recognized in this proceeding, a company has the right to consult with counsel "in a complex regulatory setting in which an enforcement action was reasonably foreseeable . . . ." Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-18, 38 NRC 121, 125 (1993). The Board aptly stated that it was "appropriate that these professionals should be given as much information as possible without having to risk public disclosure of their work." Id.. Intervenor fails to cite this ruling, which is the law of the case.

The cases cited by Intervenor to support its argument for disclosure of privileged communications, including Sneider v. Kimberly-Clark Corp., 91 F.R.D. 1, 5 (N.D. Ill. 1980), are inapposite. The underlying factual data at issue in that case involved patent disclosures and draft patent applications, and did not concern witness interview notes taken in connection with a government investigation. Moreover, in the Sneider case, the Court believed that the defendant was attempting to use a claim of privilege to prevent disclosure of information that was wholly technical. On the contrary, in this case, Intervenor has had numerous opportunities to learn the underlying facts from the witnesses through interrogatories, depositions, and in cross-examination during the hearing.

Intervenor's claim that upholding the attorney-client privilege in this case would affect the ability of the NRC to ensure compliance with 10 C.F.R. § 50.9 is ludicrous. NRC has broad investigative powers and can learn underlying facts without inquiring into privileged communications between NRC licensees and their legal counsel.

2. The Requested Documents are Protected by the Work-Product Doctrine

In addition, the requested documents are protected from disclosure by the work product doctrine. The NRC has adopted the work product doctrine in its Rules of Practice. 10 C.F.R. § 2.740(b)(2). "These rules are adopted from Rule 26(b)(3) of the Federal Rules of Civil Procedure, Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 460 (1974) . . . ." Georgia Power Co., 38 NRC at 123. Rule 26(b)(3) reflects the "'strong public policy' that a lawyer's work be entitled to privacy." Upjohn, 449 U.S. at 397-98. Under Rule 26(b)(3), courts are required to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Were discovery of such "opinion work-product" to be permitted

> much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of clients and the cause of justice would be poorly served

Hickman v. Taylor, 329 U.S. at 511.

The materials sought by Intervenor in its Supp. Motion, i.e., notes of witness interviews with client employees, are precisely the type of material sought to be protected under the opinion work-product rule. "Although th[e] language [of Rule 26] does not specifically refer to memoranda based on oral statements of witnesses, the Hickman court stressed the danger that compelled disclosure of such memoranda would reveal the attorney's mental processes. It is clear that this is the sort of material the draftsmen of the Rule had in mind as deserving special protection."

Upjohn, 449 U.S. at 400; see also id. at 399-400 ("Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes . . .'what he saw fit to write down regarding witnesses' remarks' . . .'the statement would be his [the attorney's] language, permeated with his inferences' . . . ."(citations omitted; quoting Hickman and Jackson J., concurring in Hickman.)

Conclusion

For all of the reasons stated above, Intervenor's Supplemental Motion should be denied.

Respectfully submitted,

Ernest L. Blake, Jr.
David R. Lewis

SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

James E. Joiner
John Lamberski

TROUTMAN SANDERS
Suite 5200
600 Peachtree Street, N.E.
Atlanta, Georgia 30308-2216
(404) 885-3360

Dated: August 8, 1995

August 8, 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

CERTIFICATE OF SERVICE

I hereby certify that copies of "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," 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

DOCKETED
USNRC

'95 AUG 10 P4:06

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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

SERVICE LIST

*Administrative Judge
Peter B. Bloch, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Administrative Judge
James H. Carpenter
Atomic Safety and Licensing Board
933 Green Point Drive
Oyster Point
Sunset Beach, N.C. 28468

*Administrative Judge
James H. Carpenter
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Stewart D. Ebneter
Regional Administrator, Region II
U.S. Nuclear Regulatory Commission
101 Marietta Street, N.W., Suite 2900
Atlanta, Georgia 30303

*Administrative Judge
Thomas D. Murphy
Atomic Safety and Licensing Board U.S.
Nuclear Regulatory Commission
Washington, D.C. 20555

Office of the Secretary
Att'n: Docketing and Service Branch
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Michael D. Kohn, Esq.
Kohn, Kohn & Colapinto
517 Florida Avenue, N.W.
Washington, D.C. 20001

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

*Mitzi A. Young, Esq.
*Charles Barth, Esq.
*John T. Hull, Esq.
U.S. Nuclear Regulatory Commission
Office of the General Counsel
One White Flint North, Stop 15B18
115-5 Rockville Pike
Rockville, MD 20852

Carolyn F. Evans, Esq.
U.S. Nuclear Regulatory Commission
101 Marietta Street, N.W., Suite 2900
Atlanta, Georgia 30323-0199

Adjudicatory File
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Director,
Environmental Protection Division
Department of Natural Resources
205 Butler Street, S.E., Suite 1252
Atlanta, Georgia 30334

88639-06 / DOCSDC1