

NUCLEAR REGULATORY COMMISSION  
Docket No. 50-424/425-OLA-3 EXHIBIT NO. GPC II-131  
In the matter of Georgia Power Co. et al., Vogtle Units 1 & 2  
☐ Staff ☒ Applicant ☐ Intervenor ☐ Other  
☒ Identified ☒ Received ☐ Rejected Reporter KHW  
Date 7/19/95 Witness rtasbaugh

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USNRC

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

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

Before Administrative Judges:

Peter B. Bloch, Chair  
Dr. James H. Carpenter  
Thomas D. Murphy

In the Matter of )

GEORGIA POWER COMPANY )

et al., )

(Vogtle Electric Generating )  
Plant, Unit 1 and Unit 2) )

Docket Nos. 50-424-OLA-3  
50-425-OLA-3

Re: License Amendment  
(transfer to Southern Nuclear)

ASLBP No. 93-671-01-OLA-3

**ALLEN MOSBAUGH'S RESPONSE TO  
THE BOARD'S APRIL 21, 1993 SCHEDULING ORDER  
AND REQUEST FOR A PROTECTIVE ORDER**

**Status of the Tapes**

Allen Mosbaugh, through counsel, hereby responds to the Atomic Safety and Licensing Board ("ASLB") Memorandum and Order (Ruling on Stay Request and on Scheduling), dated April 21, 1993. Therein, the ASLB stated that:

Counsel for Mr. Allen Mosbaugh shall make a good faith, earnest request for the return of Mr. Mosbaugh's copies of the tapes he had made from the Congressional committee to which he has given those tapes. He shall report to us on his efforts and the response he has received, in a document that is received by us and the parties by May 14, 1993.

In response to the request of the ASLB, counsel states as follows:

1. In June of 1990, Allen Mosbaugh's counsel had excerpts of certain tape recordings prepared. These recordings constitute counsel's work product and are predicated on attorney-client

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communications. A total of six (6) such tape recordings were made in preparation of litigation pending before the U.S. Department of Labor. The recordings were also utilized by counsel to file a petition with the Chairman of the U.S. Nuclear Regulatory Commission on September 11, 1990.

2. In September of 1990, Allen Mosbaugh turned over all his original tape recordings to the U.S. Nuclear Regulatory Commission ("NRC") Office of Investigations ("OI"). He did not maintain any copies of these original tape recordings. The only original tape recordings presently in his possession are those that were returned to him by the NRC (copies of which were made available to Georgia Power Company). Mr. Mosbaugh also maintained possession of the six recordings identified in paragraph 1.

3. On July 28, 1992, John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, requested, pursuant to Rules X and XI of the Rules of the U.S. House of Representatives, that Mr. Mosbaugh's counsel provide all tape recordings (as well as other documentation) in his possession to the Subcommittee. A Copy of Chairman Dingell's letter is appended as Attachment 1.

4. On July 29, 1992, after consulting NRC-OI (who indicated that the documentation could be turned over to the Subcommittee), counsel to Allen Mosbaugh provided the six (6) tape recordings identified in paragraph 1 to the Subcommittee.

5. The recordings were explicitly provided on condition that they be kept confidential.

6. These six (6) tape recordings include segments of some of the tape recordings that were previously released by NRC (and copied by GPC). Moreover, these tape recordings include segments of recordings that are still in the possession of NRC.

7. Mr. Mosbaugh presently has control over the six recordings identified in paragraph 1.

8. These recordings, in their present form, constitute the work product of Mr. Mosbaugh's counsel (because their creation was based on attorney-client communications for use by counsel in various legal proceedings). Mr. Mosbaugh objects to the release of these six (6) tape recordings.

9. When GPC is entitled to the original tape recordings, these recordings must be obtained from the NRC. At the present time all of the original tape recordings are in the possession of the NRC.

#### **Request for Protective Order**

GPC should not be granted access to the tape recordings until Mr. Mosbaugh and the NRC Staff have an opportunity to conduct the depositions of the relevant GPC employees and managers. It is well settled, as a matter of law, that a court should allow a person's deposition to go forward prior to giving the deponent access to his or her prior statements:

The Advisory Committee Notes [to the Federal Rules of Civil Procedure] state "[i]n appropriate cases the court may order a party to be deposed before his statement is produced," (Rule 26 committee note)...because "there is a legitimate interest in receiving a version of the party's testimony which has not been tailored to conform to an earlier statement." 4 Moore's Federal Practice ¶ 26.65.

Miles v. M/V Mississippi Queen, 753 F.2d 1349, 1351 N. 3 (5th Cir. 1985). Accord., Smith v. China Merchants, 59 F.R.D. 178, 179 (E.D. Penn. 1972).

In fact, requiring a person to be deposed prior to giving that person access to a prior statement is the "usual situation." Nelson v. Puerto Rico Marine Management, Inc., 72 F.R.D. 637, 638 (D. Md. 1976).

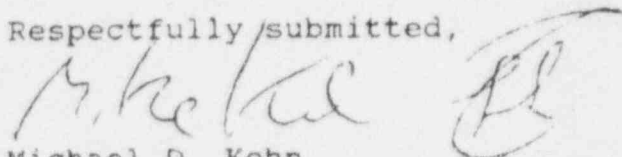
In this case, requiring GPC witnesses to be deposed prior to releasing the tapes to GPC not only conforms to standard civil discovery practice, but also serves the interests of justice. GPC witness are likely to be more candid and forthcoming at their depositions if they are deposed prior to production of the tape recordings. Additionally, the witnesses would be not be able to tailor their testimony to conform to their earlier statements or to rationalize their taped remarks.

In order to avoid delay in these proceedings, Mr. Mosbaugh would consent to deposing the witnesses who are recorded on tape as quickly as possible. Once these depositions are completed, the NRC Staff should be compelled to provide both GPC and Mr. Mosbaugh copies of the tapes along with any transcripts of the tapes which they prepared.

### Conclusion

Six (6) tape recordings are currently in the possession of Mr. Mosbaugh's counsel. This Board should not require Mr. Mosbaugh to release any of these tape recordings, as they constitute the work product of Mr. Mosbaugh's counsel. In addition, this Board should not require the release of any tape recordings relevant to this case to GPC until after Mr. Mosbaugh has an opportunity to depose the witnesses.

Respectfully submitted,



Michael D. Kohn  
KOHN, KOHN & COLAPINTO, P.C.  
517 Florida Ave., N.W.  
Washington, D.C. 20001

(202) 234-4663

Dated: May 14, 1993

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U.S. HOUSE OF REPRESENTATIVES  
OFFICE OF THE CLERK  
1000 BAYVIEW AVENUE, N.W.  
WASHINGTON, D.C. 20515-6116  
TELEPHONE (202) 225-4800  
FACSIMILE (202) 225-4801

THOMAS J. BLILEY, JR.  
RANKING REPUBLICAN MEMBER  
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS  
WASHINGTON, D.C.

U.S. House of Representatives  
Subcommittee on Oversight and Investigations  
of the  
Committee on Energy and Commerce  
Washington, DC 20515-6116

July 28, 1992

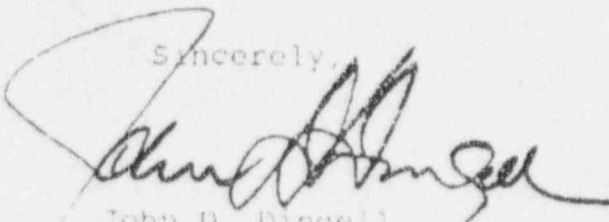
Mr. Michael D. Kohn  
National Whistleblower Center  
517 Florida Avenue, N.W.  
Washington, D.C. 20001

Dear Mr. Kohn:

Pursuant to Rules X and XI of the Rules of the U.S. House of Representatives, the Subcommittee on Oversight and Investigations is conducting an investigation into the circumstances surrounding a March 20, 1990 incident at the Georgia Power Vogtle Plant. In order to facilitate our inquiry, please provide copies of all tapes, transcripts, depositions, correspondence, and the like in your possession pertaining to the above incident.

Your prompt response in this matter will be greatly appreciated.

Sincerely,



John D. Dingell  
Chairman  
Subcommittee on  
Oversight and Investigations

cc: The Honorable Thomas J. Bliley, Jr.  
Ranking Republican Member  
Subcommittee on Oversight and Investigations



NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 1993, a copy of the foregoing was ("\*" indicates service by facsimile) served by first class mail upon the following:

\*Hon. Peter B. Bloch, Chair  
\*Hon. James H. Carpenter  
\*Hon. Thomas D. Murphy  
Administrative Law Judges  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

\*Charles A. Barth, Esq.  
Office of General Counsel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

\*John Lamberski, Esq.  
Troutman Sanders, Suite 5200  
600 Peachtree Street, N.E.  
Atlanta, GA 30308-2216

Office of the Secretary (Original and two copies)  
Attn: Docketing and Service  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

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



Stephen M. Kohn