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March 8, 1993

VIA MESSENGER

Mr. Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attention: Docketing and Service Branch

Re: Comments on the Proposed Rule on Availability of Official Records, 10 C.F.R. § 2.790, 57 Fed. Reg. 61,013 (December 23, 1992)

Dear Mr. Chilk:

On December 23, 1992, the Nuclear Regulatory Commission ("NRC" or "Commission") issued a proposed rule to, inter alia, amend 10 C.F.R. § 2.790 -- specifically, the portion of that regulation governing the withdrawal of material designated to be "trade secrets and commercial or financial information obtained from a person and privileged or confidential," 10 C.F.R. § 2.790(a)(4) ("proprietary information"), for which the agency has denied a request for withholding from public disclosure. Thereafter, the Commission invited public comment on the proposed rule. On behalf of the licensees identified below, we are filing these comments within the time period set forth in the Federal Register Notice.[1/]

1/ We are filing these comments on behalf of the following licensees: Niagara Mohawk Power Corporation, Northeast Utilities, and Texas Utilities Electric Company.

1. The NRC Should Permit The Withdrawal Of Information Made Available To, Or Prepared For, A Federal Advisory Committee If The Agency Denies A Request To Withhold The Proprietary Information From Public Disclosure.

The proposed rule will automatically prohibit the return of any and all materials made available to or prepared for a Federal Advisory Committee even in the event the agency determines not to grant the protection against non-disclosure as requested by the submitter of the materials. In support of this position, the Supplementary Information accompanying the proposed rule states that the Federal Advisory Committee Act ("FACA") requires that "all reports received by the committee must be contained in the minutes of the meeting to which they pertain (FACA, sec. 10(c))." 57 Fed. Reg. at 61013. It is the position of the Commission, therefore, that all documents made available to, or prepared for, any advisory committee may not be returned. This position goes too far.

As an initial matter, the requirement that "all reports" be contained in the advisory committee minutes does not disable the committee from protecting privileged materials. If that were the case, no materials contained in any reports would be protectable if made available to, or prepared for, any advisory committee. That is not the law. Indeed, courts have recognized that the Freedom of Information Act ("FOIA"), with its nine specific exemptions from public disclosure of information, is applicable to advisory committee proceedings. National Security Archive v. Archivist of the United States, 909 F.2d 541, 545 (D.C. Cir. 1990) ("Section 10(b) [of the FACA] renders the disclosure provisions of the FOIA applicable to advisory committees and designates each committee as the appropriate repository of its own records"); Food Chemical News v. Advisory Committee on the Food and Drug Administration, 760 F. Supp. 220, 221 (D.D.C. 1991) (same). Accordingly, the language in the FACA requiring the inclusion of "all reports" in the minutes of the meeting to which they pertain does not, in and of itself, demand the public disclosure of all such material as stated in the Supplemental Information to the proposed rule.[2/]

[2/] Nor does the fact that the FACA "has no provision for the withdrawal of a document that has been provided to an advisory committee," 57 Fed. Reg. at 61013, demand a different result. Courts that have considered the issue have held that Section 10(b) of the FACA "incorporates FOIA procedures as well as FOIA exemptions." Food Chemical News, 760 F. Supp. at 222. See also National Security Archive v. Executive Office of the

(continued...)

Recognizing that public disclosure is not demanded by the FACA, the Commission should not now amend its rule regarding the withdrawal records to absolutely bar the retrieval of materials containing proprietary information, simply because they were sent to an advisory committee. The regulation of the nuclear power industry by the Commission is unique in many respects. The highly technical aspects associated with the regulation of the industry have demanded that the industry submit detailed technical proprietary information to the NRC, and to the various advisory committees established by the agency, as they investigate, analyze, and resolve extremely complex technical issues. The industry must be in a position to believe that certain submissions will be protected by the agency, or, in the event the agency denies the requested protection, that the submitter will have the opportunity to retrieve documents prior to their public disclosure without litigation. The Commission should seek through its rules to ensure that interested persons or entities will continue to submit materials -- including, in this instance materials containing proprietary data -- to advisory committees.

With respect to the determination that information is protectable as privileged or confidential trade secrets and commercial or financial information, courts have long recognized that an agency may withhold such material where it determines that disclosure would "impair the Government's ability to obtain necessary information in the future." National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). In constructing an absolute bar to the return of materials made

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[2/] (...continued)
President, 688 F. Supp. 29, 33 (D.D.C. 1988), aff'd, 909 F.2d 541 (D.C. Cir. 1990). Accordingly, the advisory committee should operate in a manner consistent with the agency to which it is responsible. See, e.g., 10 C.F.R. § 1.11(c) (the ACRS and other committees report to the Commission). Under the NRC's proposed rule, the treatment by the NRC of proprietary material for which protection has been denied may be returned unless it has been "captured" by a FOIA request or discussed in an open meeting. See Proposed Rule § 2.790(c)(1)(iv), 57 Fed. Reg. at 61016. At a minimum, the same treatment should be afforded materials submitted to an advisory committee. Such a result would be consistent with the recognition of the applicability to advisory committees of the FOIA standards applied to the agency under which any such committee operates.

available to, or provided for, an advisory committee, the agency will effectively discourage interested persons from submitting materials containing privileged or confidential trade secrets and commercial or financial information, for which protection from public disclosure is sought. Id. at 767 ("Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired"). See also Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc) ("It is a matter of common sense that the disclosure of information the Government has secured from voluntary sources on a confidential basis will both jeopardize its continuing ability to secure such data on a cooperative basis and injure the provider's interest in preventing its unauthorized disclosure"). The proposed rule will severely undercut the availability of information to such advisory committees with a resulting decrease in their effectiveness to render advice and assistance to the agency.

We believe that the proposed rule should not provide such a bar to withdrawal of information simply because the material was submitted to an advisory committee. Rather, we believe that there is no reason to require the treatment of the submission of records to an advisory committee any differently than the treatment of the submission of records to the Commission.[3/] Accordingly, we suggest that the provision regarding the submission of records to an advisory committee be modified to correspond to the manner in which the Commission treats documents in connection with an open Commission meeting held in accordance with the Commission's Sunshine Act Regulations -- that is, to the extent that proprietary information was discussed at an open meeting of an advisory committee, the material will not be returned to the applicant, except for any material that may have been extraneous to the

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3/ Indeed, it appears inconsistent to recognize the availability of relief with respect to documents submitted to the Commission and for which protection was denied and not to recognize a similar right to relief with respect to documents submitted to an advisory committee. This may lead to the filing of materials containing proprietary information only with the Commission even though such materials would be useful to an advisory committee. Under the proposed rule, until such time as the material is then forwarded to an advisory committee, the submitter retains the right to retrieve the material. This distinction makes no sense and is not mandated or justified by the provisions of the FACA.

submittal officially before the advisory committee and that may be easily segregated from the remainder. See Supplementary Information to the Proposed Rule, 57 Fed. Reg. at 61013.

2. The NRC Staff Should Not Circulate Any Materials For Which Protection Is Sought Until The Agency Determines Whether To Grant The Requested Protection To The Materials.

First, while the present rule requires the NRC to determine claims of proprietary privilege, there is no provision in either the existing -- or the proposed -- rule requiring the agency to make its determination before the information is circulated within the agency. In the past, the NRC has permitted the submitter to demand the return of the material in the event the agency denied the request for protection and this practice has not been affected by the distribution of the material within the agency. Accordingly, the lack of a requirement regarding the timing of the determination of privilege was not significant. Under the proposed rule, however, certain relief -- specifically, the right to withdraw the material -- will no longer be afforded if the information has been circulated within the agency, including, critically, if the information was made available to an advisory committee. The NRC should not nullify the right of the submitter to seek return of proprietary materials by providing copies of such materials to an advisory committee before a determination of privilege is made.

As the Commission notes in connection with the proposed rule, "a copy of many of the documents submitted to the NRC is provided routinely" to the NRC's Advisory Committee on Reactor Safeguards (ACRS) and the NRC's Advisory Committee on Nuclear Waste (ACNW)). 57 Fed. Reg. at 61013. This includes providing copies of documents that are not specifically directed toward an advisory committee, but, for whatever reason, someone within the agency decides to send to the committee. The rights of the submitter to withdraw the information should not be allowed to be terminated by the random decision of an individual within the agency to direct a copy of a document to an advisory committee before the decision on the request for protection is made and the submitter has had the opportunity to withdraw the record if the request is denied. There is little question that licensees and other interested parties, who are encouraged to submit materials to the NRC under a variety of circumstances, will be reluctant to offer up materials voluntarily if such materials contain proprietary information, and no assurance of confidentiality is provided.

Further, the lack of specific deadlines for the determination of the grant of privilege by the agency exposes the industry to potentially long periods of uncertainty with respect to the submission of privileged or confidential trade secrets and commercial or financial information. We believe that the rule governing the release of such materials should include definite time limits for determining whether the NRC will grant the protected status to the material.

We do not foresee this procedural requirement as imposing an undue burden on the agency. The NRC currently reviews submissions in order to determine if certain material is worthy of protection prior to placing the material in the Public Document Room ("PDR"). We believe that the proposed rule should provide for a similar screening process -- with the option that the submitter may obtain the return of the information if the requested protection is denied -- before the material is circulated within the agency.

3. Section 2.790 Should Be Amended Explicitly To Provide A Procedure That Permits The Return Of Any Materials <u>For Which The NRC Has Denied The Requested Protection.</u>

Licensees often have occasion to submit information to the Commission seeking confidential treatment pursuant to § 2.790(a)(6), which allows the withholding of documents from public disclosure that constitute "[p]ersonnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This exemption is often invoked, for example, in submissions that pertain to whistleblower allegations, and which necessarily reference the conduct and/or performance of named individuals. Presently, there is no provision explicitly mandating the return of such material when the agency denies a request for confidential treatment under this exemption. However, the NRC has, in practice, generally permitted the licensee to obtain the return of such information where § 2.790 treatment is denied, thus avoiding public disclosure. We believe that the agency should, by regulation, extend the opportunity to withdraw submitted information to all denials of

protection, not just those pursuant to § 2.790(a)(4) relating to trade secrets or other proprietary information.

Sincerely,

Nicholas S. Reynolds
Marcia R. Gelman
David M. Souders