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Ms. Annette Vietti-Cook, Secretary
 U.S. Nuclear Regulatory Commission
 Washington, D.C. 20555-0001

OFFICE OF SECRETARY
 RULEMAKINGS AND
 ADJUDICATIONS STAFF

Attn: Rulemakings and Adjudications Staff

Re: **Proposed Rule on the Availability of Official Records**
(66 Fed. Reg. 52,721 (October 17, 2001)) _____

Dear Ms. Vietti-Cook:

The Nuclear Regulatory Services Group (NRSNG)* is pleased to respond to the NRC's request for comments on the proposed rule to modify 10 C.F.R. § 2.790 standards on the availability of official records. 66 Fed. Reg. 52,721 (October 17, 2001) (hereinafter, "proposed rule"). In sum, the proposed rule seeks: (1) to revise procedures governing withholding of certain documents from public disclosure, including procedures governing a standardized document marking method to support requests for withholding; (2) to address the types of documents that the NRC may release to the public after denying a submitter's request to withhold them; and (3) to permit the NRC to reproduce as many copies of copyrighted materials submitted to the NRC as it deems necessary to perform its regulatory activities. The NRSNG's comments below are limited to the first two aspects of the proposed rule.

Document Withholding: Proposed Section 2.790(b)(1) on Standardized Document Marking

Proposed Section 2.790(b) would establish a standard process for marking documents that submitters seek to have withheld from public disclosure on various grounds (e.g., trade secrets; personal privacy). The standardized marking method would require that the top of the first page and the top of each page containing confidential or proprietary information would have to be specifically marked "Confidential Information Submitted Under 10 CFR 2.790." Further, each page containing information sought to be withheld from disclosure must indicate, adjacent to the information, or at the top if the entire page is affected, the basis for proposing that the

* The NRSNG is a consortium of nuclear reactor licensees represented by the law firm of Ballard Spahr Andrews & Ingersoll, LLP.

Ms. Annette Vietti-Cook
December 31, 2001
Page 2

information be withheld.

It is common licensee practice to mark documents containing confidential or proprietary information using language similar to that in the proposed rule when submitting such documents, accompanied by correspondence requesting withholding of sensitive information contained therein. Therefore, standardizing a marking method for confidential or proprietary information generally would be consistent with current licensee practice. Furthermore, the NRSO agrees with the NRC that standardizing a document marking method should decrease the risk of inadvertent disclosure of sensitive information by the agency. The NRSO thus supports the standard document marking method proposed by the NRC.

The proposed document marking method should not, however, be used to make sensitive documents vulnerable to disclosure where a submitter inadvertently (or immaterially) fails to follow the marking requirements exactly (in effect, forfeit the protection of such documents). In the proposed rule, the NRC states that the standard document marking method is not intended to penalize a submitter in such instances. The NRC intends to "work with submitters . . . to resolve any discrepancies of which it [is] aware within a particular request" and that "[l]anguage substantially similar to that prescribed would be equally acceptable." The NRC also states, however, that it would not "assume responsibility for any unintended consequences resulting from a submitter's failure to comply with the regulatory standards." 66 Fed. Reg. at 52,723. Further, at 66 Fed. Reg. 52,730, the language of the proposed rule states that the NRC "has no obligation to review documents not so marked to determine whether they contain information eligible for withholding."

The NRSO appreciates that submitters generally should carry the burden in promptly pointing out to the NRC any inadvertent errors in marking documents as exempt from public disclosure. Nonetheless, in light of the potentially significant adverse consequences to a submitter (or licensee employees) in the event of a disclosure of proprietary or sensitive information (such as trade secrets or personnel records), the rule should further clarify how the NRC would handle situations of *inadvertent* or *immaterial* failure to comply exactly with the marking requirements. One way to clarify the proposed rule in this regard would be to specifically provide a submitter reasonable opportunity to "cure" such an error upon discovery of the error. Further, in instances where it is fairly evident that a submitter committed an inadvertent marking error and the NRC discovers the error first, the NRC should have some obligation to bring the apparent error to the submitter's attention to permit prompt remediation.

Document Withholding:

Proposed Section 2.790(b) Provisions Concerning Personal Privacy Information

As stated above, the NRSO generally supports the standardization of document marking in proposed Section 2.790(b) to support document withholding requests. It nonetheless has concerns about proposed Section 2.790(b) as it affects the potential disclosure of personal privacy information. Specifically, current Section 2.790(b)(1) requires appropriate redaction and

Ms. Annette Vietti-Cook
December 31, 2001
Page 3

an affidavit to support the withholding of "trade secrets or privileged or confidential commercial or financial information." It does not impose these requirements with respect to withholding requests concerning personal privacy information. Proposed Section 2.790(b), however, would include personal privacy information as one of the categories of documents to which the redaction and affidavit requirements would apply.

Despite the lack of a specific requirement in current Section 2.790(b) to provide an affidavit or redaction to support withholding of personal privacy information, licensees typically have marked such information as a cautionary measure. The NRC may have intended that proposed Section 2.790(b) merely codify what has been fairly common licensee practice on handling personal privacy information submitted to the NRC. The proposed rule, however, is unclear as to why the NRC would now require redaction and affidavits to support withholding of personal privacy information.

In our view, a redaction and affidavit requirement for withholding of documents containing personal privacy information would merely add an administrative burden on licensees without any corresponding benefits. Unlike the situation with proprietary or confidential business information, it is usually clear when documents contain personal privacy information, and the need to protect personal privacy information is often clear with no further justification required. Documents containing personal privacy information, particularly medical, personnel, and operator examination records, often contain information specific enough to certain individuals such that, despite redaction of the more obvious identifying information (*i.e.*, the person's name, address, and job title), these individuals may be identified with relative ease. Given the potential for vulnerability of individuals to stigma at their workplace due to their activities (*e.g.*, reporting a safety concern) or their status (*e.g.*, failure of an operator examination), we believe that personal privacy information, including medical, personnel, and operator examination records, should be excluded from the redaction and affidavit requirement. Such documents should be withheld in their entirety upon request by a submitter.

Finally, the proposed Section 2.790(b)(1)(iii) provides that an affidavit supporting a withholding request "submitted by a company" must be "executed by an officer or upper-level management official who has been specifically delegated the function of reviewing the information sought to be withheld and authorized to apply for its withholding on behalf of the company. The affidavit shall be executed by the owner of the information, even though the information sought to be withheld is submitted to the Commission by another person." This provision may not be entirely clear as to whether the individual who is the subject of the personal information or whether a licensee official would be required to execute the affidavit. We interpret the provision to mean that the NRC intends to permit a designated licensee official to execute the affidavit. The NRC should clarify this point in the final rule.

In sum, the NRSB would suggest that the proposed Section 2.790(b) provisions be revised to:

- (1) further clarify how the NRC would handle immaterial or inadvertent failure to

Ms. Annette Vietti-Cook
December 31, 2001
Page 4

follow standardized document marking requirements exactly;

- (2) exclude documents containing personal privacy information from the provision requiring an affidavit to support a document withholding request, or, if the provision requiring an affidavit is to be promulgated, then clarification of the rule to state that a licensee official may sign the affidavit; and
- (3) delete the proposed requirement on redacting various types of documents containing personal privacy information that should be protected in their entirety (e.g., operator examination results; medical records; personnel records).

Document Withdrawal and Return: Proposed Sections 2.790(c)(2) and (c)(3)

Under current Section 2.790(b), a submitter may request that the NRC withhold certain types of sensitive information from disclosure. If the withholding request is granted, the NRC will notify the submitter of its decision. If the NRC denies a withholding request, then under the current rule it will provide a 30-day opportunity to withdraw the document. If the submitter requests withdrawal, the NRC is to return the document to the submitter, provided that the information was not submitted in a rulemaking proceeding that resulted in a final rule.

In the proposed rule, the NRC would expand the types of documents that may not be withdrawn and returned to include those that: (1) form part of the basis of an official NRC decision in a rulemaking or licensing action; (2) have been requested in a Freedom of Information Act (FOIA) request; (3) were obtained during the course of an investigation by the NRC Office of Investigations (OI); (4) were made available to, or prepared for, an NRC advisory committee; or (5) were revealed or relied upon at an open NRC "Government in the Sunshine Act" meeting.

In the course of its regulatory activities, the NRC obtains numerous licensee documents. These documents may be directly relevant and necessary to enable NRC consideration of the matter before it, such as a license amendment request. In other cases, such as an OI investigation, the NRC may obtain voluminous records that provide background information or generally relate to the matter under investigation, but ultimately may not form part of the basis of any final NRC enforcement decision. For example, in discrimination cases, OI often obtains personnel files and related records that ultimately may not be important to the disposition of the case.

Proposed Section 2.790(c) provides that the NRC may refuse withdrawal of documents that fall within one of the five broad categories noted above. This could result in the improper disclosure of sensitive information. For example, all documents sought in a FOIA request would be exposed to potential release without an opportunity to withdraw them (or, at minimum, to redact sensitive portions) where someone files a sweeping "blanket" FOIA request for any and all documents related to some subject. Similarly, the proposed rule would expose to potential disclosure all documents obtained by OI in the course of an investigation, without regard to their

Ms. Annette Vietti-Cook
December 31, 2001
Page 5

actual relevance to an official NRC finding or decision.

We would suggest that the proposed categories of documents precluded from withdrawal be more narrowly focused. For documents obtained by OI during the course of an investigation, only documents and information that *specifically* form part of the basis for the NRC's decision in the investigation or enforcement matter should be subject to disclosure. In this way, merely background information and documents only marginally relevant to the OI investigation would not be disclosed. Similarly, for documents sought in a FOIA request, only documents that are *specifically* identified and sought in the request should be subject to disclosure. Exceptions for documents "made available to" an NRC advisory committee or "revealed" at an open Commission meeting, too, potentially could be overly broad. These exceptions also should be narrowed to include only documents on which advisory committees and/or the Commission have relied to make an official finding, or develop a report, decision or policy.

The NRSRG supports the NRC's effort to revise Section 2.790 standards through this rulemaking effort, particularly with respect to the proposed standardization of document marking. We believe that clearer, more streamlined procedures governing the availability of official agency records are particularly timely and appropriate given that in today's competitive electric market, more and more plant operational information, such as outage schedules, has become sensitive business information that can have an impact on the market or on a licensee's competitive position if disclosed. We respectfully would request that the language of the proposed rule on document marking be further clarified, the provisions concerning personal privacy information be revised along the lines described above, and the exceptions to document withdrawal be more narrowly construed as suggested. These changes, we believe, would more equitably balance the public's right-to-know with respect to NRC activities and document submitters' interest in safeguarding confidential business and other information that should not be within the purview of the general public.

Again, we appreciate the opportunity to comment on this rulemaking.

Sincerely,

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Susan S. Yim

Counsel for the
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Ms. Annette Vietti-Cook
December 31, 2001
Page 6