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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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November 19, 2003

Sherwin E. Turk, Esq.
Office of the General Counsel
Mail Stop - 0-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Re: Safeguards Information and the State's Expert Reports on Aircraft Crash Consequences

Dear Mr. Turk:

I refer to your letter to the Board (with copies to the service list), dated November 17, 2003, in which you state: "[t]he NRC Staff in the Office of Nuclear Security and Incident Response (NSIR) has reviewed" six expert reports the State filed with the Licensing Board in September 2003 "to determine whether those documents or portions thereof should be treated as safeguards information (SGI)." Your letter then states: "the Staff has determined that the following documents contain SGI," namely two reports authored by Dr. M. C. Thorne (criticality and probability analyses), one by Dr. C. M. Hoffman, *et al* (evaluation of F-16 and ordnance impacts), and another by Dr. G. Thompson (radiation dose consequences).

In a June 25, 2003 conference call with the Board there was a discussion between Judge Farrar and you about how the State may appeal a Staff safeguards determination. That discussion ended with you noting that you could not give a position, at that time, on whether such an appeal should proceed through the Board or should be taken up through the Staff's chain of command. Tr. 13940. Therefore, I request a response to the following questions so that the State may evaluate what legal avenues it may pursue to protect its interests.

First, I have been unable to find any NRC rules or guidance applicable to challenging a determination that a document is SGI, and I assume there are none. Please confirm this assumption.

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Second, was the determination – as opposed to the review – that the four Utah expert reports contain SGI made by the Office of Nuclear Security and Incident Response? Your letter is unclear as to what NRC official actually made the determination that four expert reports, apparently in their entirety, must be handled under the very restrictive and cumbersome procedures pertaining to safeguards material (e.g., keeping documents, notes, etc. in a locked safe or similar container; inability to discuss the contents of the reports on a regular telephone line or by e-mail; etc.). Instead, you refer generically to “the Staff” making the determination. The issue of who specifically made the decision is relevant to how the State may legally challenge this determination. Therefore, please provide the name of the NRC official responsible for the SGI determination.

Third, specifically what portions of the four documents contain SGI? During the June 25 conference call with the Board, Mr. Bernard Stapleton of NSIR gave the Board and the parties an overview of the steps involved when NSIR makes a safeguards determination. Mr. Stapleton advised that NSIR takes into consideration whether the information is already in the public domain and the effects of accumulating public information. He noted “even though we may mark a particular document or report as Safeguards information, we’re also required to what they call portion mark the document.” Tr. at 13952-53. He further explained that in some instances only a few pages of a large document may have triggered a Safeguards determination. Accordingly, the State requests that you provide us a “portion marked” copy of the four Utah expert reports which distinguishes what is or is not Safeguards information. This issue is relevant to the State’s evaluation of the Staff’s SGI determination.

I understand that we are entering into an uncharted area; your cooperation in responding to these necessary and relevant questions is appreciated.

Sincerely,



Denise Chancellor
Assistant Attorney General

cc: Service List