

May 14, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Presiding Officer

May 18, 2004 (4:52PM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)	
)	Docket No. 70-143
NUCLEAR FUEL SERVICES, INC.)	Special Nuclear Material
)	License No. SNM-124
(Blended Low Enriched Uranium Project))	

JOINT MOTION FOR PROTECTIVE ORDER GOVERNING NON-DISCLOSURE OF PROPRIETARY INFORMATION

Applicant Nuclear Fuel Services, Inc. ("NFS"), intervenor State of Franklin Group of the Sierra Club et al., and the NRC Staff file this joint motion requesting a protective order governing access to and disclosure of proprietary information in the above captioned proceeding. The parties request that the Presiding Officer adopt the attached draft protective order (with the attached Confidentiality and Non-Disclosure Agreement and Confidentiality Undertaking). The draft protective order and its attachments have been reviewed and agreed upon by counsel for all parties.

The issuance of a protective order governing access to and disclosure of proprietary information is appropriate under 10 C.F.R. §§ 2.790(a)(4) and (b)(6)(iii).¹ In submitting its license amendment applications and supporting material to the NRC, NFS has indicated which information in its submissions should be treated as proprietary and confidential, under 10 C.F.R. § 2.790(a)(4), as trade secrets or privileged or confidential commercial or financial information. In accordance with NRC regulations, NFS will also indicate which information in its future submissions to the NRC, if any, should be similarly protected as proprietary and confidential.

¹ Now sections 2.390(a)(4) and (b)(6) in the new 10 C.F.R. Part 2.

Respectfully submitted,



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D. Sean Barnett

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Dated: May 14, 2004

May 14, 2004

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NUCLEAR REGULATORY COMMISSION**

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CERTIFICATE OF SERVICE

I hereby certify that copies of Joint Motion for Protective Order Governing Non-Disclosure of Proprietary Information were served on the persons listed below by electronic mail, facsimile or by deposit in the U.S. mail, first class, postage prepaid, this 14th day of May, 2004.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Administrative Judge
Alan S. Rosenthal, Presiding Officer
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Fax: 301-415-5599
email: rsnthl@aol.com; sam4@nrc.gov

Administrative Judge
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U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
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Office of the Secretary
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
One White Flint North
Rockville, MD 20852-2738
Attention: Docketing and Service Branch
Fax: 301-415-1101
Email: hearingdocket@nrc.gov
(original and two copies)

Diane Curran, Esq.
Harmon, Curran, Spielberg & Eisenberg,
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D. Sean Barnett

Protective Order for Use in NFS BLEU Project Proceeding

This Protective Order governs the disclosure and use of certain Protected Information¹ potentially relevant to the application of Nuclear Fuel Services, Inc. (“NFS”) for license amendments to support the Blended Low-Enriched Uranium Project at its Erwin, Tennessee, facilities. Specifically, counsel and consultants for the State of Franklin Group of the Sierra Club et al. (“Sierra Club”), shall be permitted access to Protected Information upon the following conditions:

1. Sierra Club shall execute the attached Confidentiality and Non-Disclosure Agreement.

2. Only individual counsel, consultants, and others who have executed the attached Confidentiality Undertaking may have access to Protected Information on a “need to know” basis pursuant to this Protective Order.

3. Counsel, consultants, and others who receive any Protected Information (including transcripts of any *in camera* oral presentations, filed testimony, or any other document that reveals Protected Information) shall maintain its confidentiality as required in the attached Confidentiality and Non-Disclosure Agreement, the terms of which are hereby incorporated in this Protective Order.

4. Counsel, consultants, and others who receive any Protected Information shall use it solely for the purpose of participation in this proceeding in matters directly pertaining to the Protected Information, and for no other purpose.

¹ “Protected Information” means the information set forth at Section 1 of the Confidentiality and Non-Disclosure Agreement, annexed hereto, as well as any use of or reference to that material in this proceeding, including, but not limited to, written or oral presentations or transcripts of proceedings related to this material.

5. Counsel for Sierra Club shall keep a record of all documents containing Protected Information in the possession of Sierra Club (including counsel, consultants, and others) and shall, upon termination of this proceeding, account for and deliver that information for disposal or safekeeping to a person authorized to receive Protected Information on behalf of NFS, in accordance with the attached Confidentiality and Non-Disclosure Agreement.

6. There shall be a limit of two transcripts per party for any proceeding conducted on the record in which Protected Information is disclosed or discussed. Parties shall not reproduce or photocopy these transcripts without the express prior approval of the Presiding Officer.

7. In addition to the requirements specified in the Confidentiality and Non-Disclosure Agreement, all pleadings and correspondence in this proceeding (including testimony) that contain any Protected Information shall be segregated and:

- (a) served only on lead counsel,² the Presiding Officer, and the NRC's Office of the Secretary;³
- (b) served only by United States registered, express, or certified mail, by internal NRC mail, by overnight delivery (e.g., Federal Express), or by personal delivery; and
- (c) include an attached cover letter or memorandum, which shall be served on all participants to the proceeding, the Presiding Officer, and the Office of the Secretary, by United States Postal Service first-class mail, with a copy by e-mail, that briefly describes the contents of the pleading or correspondence without reference to any Protected Information such that the cover letter or memorandum can be placed in the public docket of the proceeding.
- (d) The parties shall not make any facsimile or e-mail transmission to the Presiding Officer or parties of document(s) which contain or discuss Protected Information subject to this Protective Order, in contrast to the

² The following attorneys shall be considered "Lead Counsel" for service purposes: Daryl Shapiro (NFS); Diane Curran (Sierra Club); and Angela Coggins (NRC Staff).

³ The original and two copies of the pleading or correspondence containing the Protected Information should be appropriately marked and served on the Secretary of the Commission (Rulemaking and Adjudications staff).

procedure which has been established for the service of other documents in this proceeding. Any such documents should be served in accordance with Paragraph 7 of this Protective Order by an approved means that will ensure receipt on the day due. Further, the parties should submit copies of documents which contain or discuss Protected Information on a 3.5 diskette or a compact disc, along with a paper copy.

8. When a party prepares pleadings or correspondence in this proceeding (including testimony) that contain any Protected Information, the party shall prepare one copy of the pleading or correspondence containing the Protected Information and one copy with the Protected Information redacted. The copy containing the Protected Information shall not be disclosed to anyone who has not executed the attached Confidentiality and Non-Disclosure Agreement. The copy with the Protected Information redacted shall be releasable to individuals who have not executed a Confidentiality and Non-Disclosure Agreement but only after NFS has had 10 business days (from the date on which the filing was due) to review the copy to ensure that all of the Protected Information has in fact been redacted.

9. With respect to any pleadings or correspondence in this proceeding (including testimony) that the originating party believes do not contain any Protected Information, the pleadings or correspondence shall nevertheless be protected from disclosure to individuals who have not executed a Confidentiality and Non-Disclosure Agreement for 10 business days to allow NFS to review the pleading or correspondence to ensure that they do not contain any Protected Information.

10. Counsel, experts or any other individual who has reason to suspect that documents containing Protected Information may have been lost or misplaced (for example, because an expected document has not been received) or that Protected Information has otherwise become available to unauthorized persons shall notify this Presiding Officer promptly of those suspicions and the reasons for them.

11. This Protective Order does not encompass any safeguards or security information protected in accordance with the requirements of 10 C.F.R. Part 73.

12. Any violation of the terms of this Protective Order or a Confidentiality and Non-Disclosure Agreement executed in furtherance of this Protective Order may result in the imposition of sanctions as the Presiding Officer or the Commission may deem appropriate, including but not limited to referral of the violation to appropriate bar associations and/or other disciplinary authorities.

It is so ORDERED.

FOR THE PRESIDING OFFICER

**CONFIDENTIALITY AND
NON-DISCLOSURE AGREEMENT**

THIS CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT ("Agreement") is entered into as of this _____ day of _____, 2004, by and between Nuclear Fuel Services, Inc. ("NFS") and the State of Franklin Group of the Sierra Club et al. ("Sierra Club").

In consideration of the mutual promises contained herein, the parties agree as follows:

1. NFS may disclose to Sierra Club certain proprietary information potentially relevant to NFS's license amendment requests to the U.S. Nuclear Regulatory Commission ("NRC"), dated February 28, 2002, October 11, 2002, and October 23, 2003, seeking to support process operations associated with the Blended Low-Enriched Uranium Project at NFS's Erwin, Tennessee facilities. NFS will clearly identify such proprietary information at the time it is disclosed, and will appropriately mark that information. Collectively, any disclosed information so identified and marked shall be referenced in this Agreement as the "Protected Information" and shall be subject to this Agreement.

2. With respect to the Protected Information, and in accordance with the Protective Order of the Presiding Officer issued on _____, 2004 ("Protective Order"), Sierra Club agrees to:

- (a) restrict disclosure only to Sierra Club's counsel, consultants, employees or representatives with a need to know such information for purposes of evaluating the above-referenced license amendment requests, and only after advising them of the requirements of this Agreement and having them sign an undertaking in the form of Exhibit A agreeing to be bound by the terms of this Agreement;
- (b) not disclose the Protected Information to third parties unless required to do so by law, regulation or legal process and only after notifying NFS prior to disclosure of the requirement and providing NFS with the opportunity to seek an appropriate protective order
- (c) use the Protected Information only for the purpose of evaluating the above-referenced license amendment requests;
- (d) use the same degree of care with respect to the Protected Information as it uses to protect its own confidential and private information which standard of care shall be no less than reasonable care;
- (e) return the Protected Information to an authorized representative of NFS, or NFS's counsel, promptly upon Sierra Club completing its review and, in any event, no later than thirty (30) days after the date of final NRC action on the license amendment requests, including any and all copies thereof containing Protected Information then in the possession of Sierra Club or its counsel, consultants, employees or representatives, and shall ensure the destruction of any summaries, notes or extracts thereof.

3. Should Sierra Club desire to rely upon, reference, or cite the Protected Information, or any part thereof, in any comments to the NRC or proceeding at the NRC in connection with the license amendment requests, Sierra Club agrees to utilize appropriate NRC procedures, including those outlined in 10 C.F.R. § 2.790⁴ and those outlined in the Protective Order, to assure that the Protected Information is treated by the NRC as confidential proprietary information.

4. Sierra Club agrees that any threatened or existing violation of this Agreement may cause NFS and/or NFS's contractors irreparable harm for which NFS and/or NFS's contractors would not have an adequate remedy at law, and that NFS and/or NFS's contractors shall be entitled to seek immediate injunctive relief prohibiting such violation in addition to any other rights or remedies. If a party is liable to the other on account of this Agreement, the measure of damages shall include any amount for indirect, incidental, consequential, or punitive damages and/or lost profits.

5. The parties recognize that Sierra Club may ask the NRC to decide on the confidential status of the Protected Information, and all parties will undertake to provide the level of confidentiality determined by the NRC to be appropriate. NFS and Sierra Club each has the right to seek changes in the level of confidentiality to be afforded by the NRC, subject to the following:

- (a) Nothing in this Agreement shall be deemed to preclude Sierra Club from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this proceeding under this Agreement. Accordingly, nothing in this Agreement shall be deemed to preclude any party in any other administrative or judicial proceeding from seeking protected status for any such information or materials.
- (b) Nothing in this Agreement shall be deemed to preclude any party from pursuing any available administrative or judicial appeals with respect to any NRC decision regarding the appropriate confidential treatment to be afforded the Protected Information by the NRC under 10 C.F.R. § 2.790. If at any time the NRC finds that the Protected Information need not be protected, Sierra Club agrees that the Protected Information will continue to be protected under this Agreement for an additional fifteen (15) days pending an appeal of the NRC decision. Nothing in this Agreement shall be deemed to preclude any party from seeking additional administrative or judicial appeals of NRC decisions with respect to the confidential treatment of Protected Information.

6. This Agreement shall be governed and construed in accordance with the laws of the District of Columbia without giving effect to its principles of conflict of laws. The parties shall submit to the exclusive jurisdiction of the district and federal courts located in the District of Columbia for any dispute arising out of this Agreement.

⁴ Now section 2.390 in the new 10 C.F.R. Part 2.

7. If any provision of this Agreement is held to be illegal, invalid or unenforceable, such provision shall be fully severable and this Agreement shall be construed as if the illegal, invalid or unenforceable provision had never been a part of this Agreement and the remaining provisions of this Agreement shall be given full force and effect.

8. No party shall assign its rights or delegate its duties hereunder to a third party without the prior written consent of the other party.

9. NFS and/or NFS's contractors, as applicable, shall retain all rights, title, and interest in and to the Protected Information that is transmitted subject to this Agreement.

10. This Agreement shall become effective as of the date first written above. This Agreement contains the entire agreement between the parties concerning the confidentiality and non-disclosure of the Protected Information and no modifications of this Agreement or waiver of its terms and conditions shall be binding unless agreed to in writing by each party hereto.

NUCLEAR FUEL SERVICES, INC.

**STATE OF FRANKLIN GROUP OF THE
SIERRA CLUB**

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

EXHIBIT A

CONFIDENTIALITY UNDERTAKING

With reference to the Confidentiality and Non-Disclosure Agreement by and between Nuclear Fuel Services, Inc. and the State of Franklin Group of the Sierra Club et al., dated as of _____, 2004 (the "Agreement"), the undersigned affirms that he/she has read the Agreement and agrees to be bound by the terms and provisions thereof as if he/she were himself a party thereto.

Date: _____, 2004

By: _____

Name: _____

Title: _____