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(69 FR 22737)

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July 12, 2004

July 12, 2004 (4:32PM)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Secretary  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

ATTN: Rulemakings and Adjudications Staff

RE: **Request for Comment; Public Records**  
**(RIN 3150-AH12) 69 Fed. Reg. 22,737**

Ladies and Gentlemen:

On April 27, 2004, the NRC published the captioned request for public comment related to proposed amendments to regulations associated with NRC record management and public access to certain agency records. Provided herein are the comments of the Licensing and Design Basis Clearinghouse ("LDB Clearinghouse").<sup>1</sup> The LDB Clearinghouse appreciates the opportunity to comment on this important topic.

## OVERVIEW OF PROPOSED AMENDMENTS

The Staff is proposing to amend its regulations in 10 C.F.R. Part 9 to: (1) reflect changes regarding officials who initially deny access to records or deny access to records whose initial denial has been appealed; (2) reflect a change of an appellate official due to a reorganization; (3) establish NRC procedures to give pre-disclosure notification to submitters of confidential business or commercial information, consistent with Executive Order ("EO") 12600, "Predisclosure Notification Procedures for Confidential Commercial Information" (June 23, 1987); and (4) make a number of clarifying and conforming amendments.

<sup>1</sup> The LDB Clearinghouse is a consortium of utilities formed in the mid-1990s to monitor actions related to nuclear power plant licensing and design bases issues.

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SECY-02

### COMMENTS

The LDB Clearinghouse is interested in this proposed amendment because licensees have occasion to submit information – *e.g.*, in support of a license amendment request – that contains trade secrets or commercial information. Vendors and consultants may also provide information of this nature in support of licensing actions. The LDB Clearinghouse generally agrees with the proposed amendments and believes that the amended regulations will establish the appropriate procedures for implementing EO 12600. We have, however, identified certain aspects of new § 9.28 that we believe warrant further consideration. We explain our concerns below and provide recommendations for implementing the final amendment.

#### Significant Element of the Proposed Rule

To establish regulations consistent with EO 12600, the amended rule would include a new provision requiring the NRC to give written notice to submitters of trade secrets or confidential commercial or financial information of the NRC's intent to disclose this information in response to a Freedom of Information Act<sup>2</sup> request. 10 C.F.R. § 9.28(a). The submitters may object to the disclosure within 15 days from the date of the NRC's notice by providing a detailed written statement specifying all grounds that support why the information is a trade secret or commercial or financial information that is and should remain privileged or confidential. 10 C.F.R. § 9.28(b). The importance of this provision is that it allows the submitter of the information to provide additional support to assist the NRC in making a final determination whether and why the information is and should remain proprietary and confidential.

The NRC will consider the submitter's written statement and determine whether to withhold the information, and will provide notice to the submitter as well as to the FOIA requester, of its determination. 10 C.F.R. § 9.28 ¶¶ (c) and (d). The amended rule would also require the NRC to promptly notify the submitter of information whenever a requester files a lawsuit seeking to compel disclosure of trade secrets or confidential commercial or financial information. 10 C.F.R. § 9.28(e).

#### Proposed Time Period for Filing an Objection

The NRC proposes to allow a period of 15 days for a submitter to file an objection upon notification that the NRC has determined that certain information will be disclosed. This short time period may interfere with the submitter's ability to provide supporting information as to why the information should not be disclosed. The LDB Clearinghouse recommends that, unless the FOIA request has been submitted with a justification that "time is of the essence," the regulations should allow a period of 30 days for a submitter of proprietary information to file an objection. The final rule should be revised to provide this additional time.

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<sup>2</sup>

5 U.S.C. 552.

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The LDB Clearinghouse also recommends that the implementing guidance describe actions in accordance with proposed section 10 C.F.R. § 9.28(c)(3), which addresses notice to the submitter of the NRC Staff's final decision to disclose, and, more specifically, that the notice will include a specified disclosure date, "which must be a reasonable time subsequent to the notice." After notice of the NRC's decision to disclose, a submitter's recourse is to file a lawsuit seeking to prevent disclosure. The NRC Staff should, therefore, ensure that its implementing regulatory guidance specify that the "reasonable time" period be sufficient to allow a submitter time to file such a lawsuit, if desired. We recommend that this period be a minimum of 60 days.

If you have any questions regarding the comment discussed above, please contact Mark Wetterhahn or Patricia Campbell.

Sincerely,

A handwritten signature in black ink, appearing to be 'Mark J. Wetterhahn', with a long horizontal line extending to the right.

Mark J. Wetterhahn  
Patricia L. Campbell  
Counsel for the LDB Clearinghouse