

January 6, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of)	Docket Nos.	70-143-MLA,
)		70-143-MLA-2,
)		70-143-MLA-3
NUCLEAR FUEL SERVICES, INC.)	ASLBP Nos.	02-803-04-MLA,
(Erwin, Tennessee))		03-810-02-MLA,
)		04-820-05-MLA

NRC STAFF RESPONSE TO INTERVENORS' OPPOSITION
TO NRC STAFF'S MOTION FOR PROTECTIVE ORDER

INTRODUCTION

At the request of the Presiding Officer, the Staff of the Nuclear Regulatory Commission hereby responds to the "Intervenors' Opposition to NRC Staff's Motion for Protective Order" (Intervenors' Opposition).¹ The Intervenors' Opposition opposes a motion for a protective order filed by the Staff on December 20, 2004,² asserting that the Staff should be required to craft a protective order that more narrowly protects sensitive information. See Intervenors' Opposition at 8. As set forth below, the proposed protective order is narrowly tailored to serve a compelling public interest (preventing disclosure of information that could potentially aid a terrorist) and is not in violation of any law or regulation.

BACKGROUND

On October 25, 2004, the Presiding Officer was informed that the Commission had temporarily blocked public access to all documents through the Agencywide Document Access and

¹ See E-mail from SherVerne Cloyd to Shelly Cole, Diane Curran, Daryl Shapiro, and Sean Barnett, dated Jan. 3, 2004.

² See "NRC Staff Motion for Protective Order Governing Disclosure of Sensitive Information," December 20, 2004 (Motion).

Management System (ADAMS), including those related to this proceeding.³ As a result, public access to the Electronic Hearing Docket (EHD) for this proceeding was also blocked. The shut-down of ADAMS was ordered to facilitate a security review of publicly available documents to ensure that potentially sensitive unclassified information would be removed from the NRC website so that any information which might provide assistance to terrorists would be inaccessible.

So that all parties might be afforded prompt access to relevant documents and filings in order to continue the conduct of this proceeding in these unusual circumstances, the Staff filed its Motion. Attached to the Motion were a proposed protective order and an accompanying confidentiality and non-disclosure agreement, which would cover all documents in the hearing docket and/or hearing file to date, as well as documents subsequently added to the hearing docket and hearing file, and would require non-disclosure of any information not screened and approved by the Staff as non-sensitive. Counsel for Nuclear Fuel Services, Inc. (NFS) notified Staff Counsel that it supported the approach taken in the Motion. Counsel for the State of Franklin Group of the Sierra Club, et al. (Intervenors) responded that it opposed the approach taken in the Motion.

On December 21, 2004, the Presiding Officer issued a Memorandum and Order requesting that the Staff respond to two questions regarding its Motion. The Staff provided written responses to these questions on December 27, 2004.⁴ On December 22, 2004, the Staff filed its response to the Intervenors' written presentation,⁵ and, as indicated in its Motion, the Staff's Responsive

³ See Letter from Angela B. Coggins, Counsel for NRC Staff, to the Administrative Judges dated Oct. 25, 2004.

⁴ See "NRC Staff Response to Memorandum and Order," December 27, 2004.

⁵ See "NRC Staff Response to the Legal and Evidentiary Presentation of the Sierra Club, et al.," December 22, 2004 (Responsive Presentation). The Intervenors' written presentation was filed on October 14, 2004, prior to the shut-down of public access to ADAMS. See "Legal and Evidentiary Presentation by State of Franklin Group of the Sierra Club, [et al.] Regarding U.S. Nuclear Regulatory Commission Staff's Failure to Comply with National Environmental Policy Act in Licensing the Proposed BLEU Project."

Presentation had attached as exhibits documents that contained redactions. On December 29, 2004, the Staff informed the Presiding Officer that the public Citrix-based version of the ADAMS Publicly Available Records System (PARS) had been restored to include non-sensitive, publicly-available documents in the docket for this proceeding.⁶ On December 30, 2004, Intervenors filed a response opposing the Staff's Motion. See Intervenors' Opposition. At the request of the Presiding Officer, the Staff now responds to the Intervenors' Opposition.

DISCUSSION

Intervenors argue that the proposed protective order fails to reflect the completion of the Staff's sensitivity review and assert that the Staff should have sought a narrower protective order for specific portions of sensitive documents rather than the documents in their entirety. See Intervenors' Opposition at 4, 8. However, the proposed protective order was drafted to cover only information that has not been screened or information that has been determined to be sensitive. "Protected sensitive information," as defined in the proposed protective order, does not include any document that has been screened and approved by the NRC Staff as not containing sensitive information. See Proposed Protective Order at 1, n. 1. The Staff interprets this to mean that any document determined not to contain sensitive information or from which all sensitive information has been redacted is not "protected sensitive information" covered by the protective order. The Staff believes that the proposed protective order, as drafted, covers only the portions of a document determined to be sensitive, not the entire document. However, the Staff has no objection to modifying the language of the protective order to make this more explicit.

⁶ See Letter from Marian L. Zabler, Counsel for NRC Staff, to the Administrative Judges, dated Dec. 29, 2004. As indicated in this letter, the Staff determined that some previously publicly available documents should be withheld from disclosure. Attached to the letter was a list of documents that the Staff had determined to be sensitive. In addition, the Staff had previously indicated to the parties that three Environmental Assessments relating to the NFS facility were sensitive and included redacted versions of these documents as exhibits to its Responsive Presentation.

Intervenors acknowledge that Staff redactions of the documents attached as exhibits to the Responsive Presentation were “quite limited” and that the class of information that the Staff considers sensitive is “rather narrow.”⁷ Intervenors’ Opposition at 7. The redaction process is ongoing for the remaining documents in the NFS hearing docket and hearing file identified as sensitive and should be complete by January 28, 2004. The Staff has no objection to providing redacted copies of these documents to the Presiding Officer and parties at that time. As discussed above, these redacted copies would not be covered by the proposed protective order or non-disclosure agreement. Thus, the proposed protective order is narrowly tailored to protect only the sensitive portions of documents and is not overly broad.

Intervenors also assert that the proposed protective order would violate NRC regulations and the Freedom of Information Act (FOIA). They point to NRC regulations and case law that require a balancing of the competing interests before a protective order is issued. The Staff does not dispute that such a balancing is appropriate, but does believe that in this case the compelling interest in preventing dissemination of information which could aid a terrorist outweighs Intervenors’ interest in speaking publicly about the narrow class of information that is considered sensitive.

Intervenors also state that the Staff has not identified a legal exception to FOIA that would sanction the “blanket non-disclosure” of sensitive documents. See Intervenors’ Opposition at 6. As discussed above, the protective order would not require blanket non-disclosure. In fact, the Staff is in the process of redacting sensitive documents, and any information in these documents that is not redacted, including information on the potential environmental risks of the BLEU Project, can

⁷ Intervenors request that the Staff be required to submit its sensitivity criteria to the Presiding Officer and parties. See Intervenors’ Opposition at 8. The “Staff Review Criteria To Identify Sensitive Information in Fuel Cycle Documents,” dated Dec. 21, 2004, is available on the NRC website at: <http://www.nrc.gov/materials/fuel-cycle-fac/review-criteria-fuel-cycle.html>.

be disclosed.⁸ Further, Intervenors allege that the Staff has not identified any significant security risk that would outweigh the harm of “casting a shroud over all information regarding environmental risks posed by the proposed BLEU Project.” See Intervenors’ Opposition at 6. The Staff has, however, identified a security risk that it seeks to avoid, specifically the public dissemination of documents that could provide assistance to terrorists.⁹

Finally, Intervenors argue that “the proposed protective order would constitute an unlawful restraint on Intervenors’ freedom of speech under the First Amendment because it would essentially constitute a blanket gag order.” See Intervenors’ Opposition at 7. As discussed above, the proposed protective order is not intended to require blanket non-disclosure. In addition, as to one who voluntarily assumes a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public. See *United States v. Aguilar*, 515 U.S. 593, 606 (1995) (citing *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam)). In this case, even if a protective order were granted, a party could elect not to sign the non-disclosure agreement; refusing to sign would mean only that the party would receive redacted documents and would not be provided with the unredacted versions. If a party elects not to sign the non-disclosure agreement, any documents that the party already has in its possession or gets through other sources will not be affected by the protective order.

⁸ For example, see the limited redactions of the Environmental Assessments attached as Exhibits 1-3 to the Responsive Presentation.

⁹ See NRC News Release 04-135, NRC Initiates Additional Security Review of Available Documents; Temporarily Suspends Agency’s On-line Library, October 25, 2004, available on the NRC website at: <http://www.nrc.gov/reading-rm/doc-collections/news/2004/04-135.html>.

CONCLUSION

As set forth above, the Staff believes that its proposed protective order is narrowly tailored to protect only information that could potentially aid a terrorist. The Staff also believes that a protective order would be appropriate in this proceeding and would not violate any law or regulation.

Respectfully submitted,

/RA/

Shelly D. Cole
Counsel for NRC Staff

Dated at Rockville, Maryland
this 6th day of January, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENORS' OPPOSITION TO NRC STAFF'S MOTION FOR PROTECTIVE ORDER" in the above-captioned proceeding have been served on the following by deposit in the Nuclear Regulatory Commission's internal mail system as indicated by an asterisk (*), or by U.S. Mail, first class, and electronic mail (or facsimile) as indicated by a double asterisk (**) on this 6th day of January, 2005.

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