

December 30, 2004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE PRESIDING OFFICER

DOCKETED  
USNRC

December 30, 2004 (4:43pm)

In the matter of )

Nuclear Fuel Services, Inc. )

(Materials License SNM-124) )

Docket No. 70-143

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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

**I. INTRODUCTION**

Intervenors, the State of Franklin Group of the Sierra Club, Friends of the Nolichucky River Valley, Oak Ridge Environmental Peace Alliance, and Tennessee Environmental Council hereby submit their opposition to NRC Staff Motion for Protective Order Governing Disclosure of Sensitive Information (December 20, 2004) (hereinafter "Staff Motion"). This opposition also takes into account NRC Staff Response to Memorandum and Order (December 27, 2004) (hereinafter "Staff Response") and the December 29, 2004, letter sent by NRC Staff counsel Marian L. Zabler to Judges Rosenthal and Cole. As discussed below, the Staff's proposed protective order is neither lawful nor fair under the Freedom of Information Act and NRC standards for issuance of protective orders. Moreover, it is so unjustifiably broad as to amount to a gag order on Intervenors' counsel, in violation of the First Amendment. Finally, the Motion should be denied because the Staff has available to it a much less drastic remedy than the issuance of a blanket protective order.

## II. BACKGROUND

This case began in the fall of 2002, when Nuclear Fuel Services (“NFS”) filed the first of three license amendment applications regarding the proposed Blended Low Enriched Uranium (“BLEU”) Project. In three separate hearing requests, Intervenors charged, among other things, that NFS’s license amendment applications were deficient because they were not supported by an Environmental Impact Statement (“EIS”).

Over the course of the next two years, Intervenors and their counsel collected, reviewed and analyzed thousands of pages of licensing documents generated by NFS and the Nuclear Regulatory Commission (“NRC” or “Commission”) Staff, including the license amendment applications, responses to Requests for Additional Information (“RAIs”), and safety and environmental review documents. On October 14, 2004, Intervenors submitted their legal and evidentiary presentation in this proceeding. Citing portions of the three license amendment applications, the Staff’s Environmental Assessments, and the Staff’s Safety Evaluations for the proposed BLEU Project, Intervenors argued that NFS’s and the NRC Staff’s own risk estimates demonstrate that the environmental impacts of potential accidents at the BLEU Project are significant and therefore require preparation of an EIS.

On October 25, 2004, the NRC shut down its public document retrieval system, known as ADAMS, for the purpose of removing allegedly “sensitive” information from the website. The shutdown of ADAMS made it impossible for Intervenors and other members of the public to retrieve any documents related to this proceeding from ADAMS. While Intervenors had already retrieved and printed out most documents that

they considered relevant to NFS's license amendment applications, the shutdown of ADAMS affected their ability to identify and retrieve any documents generated after October 25, 2004.

On December 20, 2004, the Staff filed its Motion, requesting the Presiding Officer to issue a protective order that 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," *i.e.*, all relevant documents generated by NFS and the NRC Staff since the inception of this proceeding. Staff Motion at 2. Upon signing a nondisclosure agreement, counsel for Intervenors would be prevented from discussing the entire subject matter of this proceeding with any member of the public who had not signed a confidentiality agreement, including members of the Intervenor environmental and civic organizations and members of the press. Proposed Protective Order, note 1 and par. 2. Penalties for noncompliance would include "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." *Id.*, par. 10.

On December 21, 2004, the Presiding Officer issued a Memorandum and Order which asked the NRC Staff to explain why it had waited so long after October 25 to file its motion for a protective order, and whether the Staff has in fact completed its sensitivity review, thus resolving the problem posed in the Motion.

On December 27, 2004, the Staff filed its Response. With regard to the reasonableness of the timing of the Staff's Motion, the Staff admitted that it did not reach

a conclusion that a protective order would be needed until sometime after December 9, but failed to explain why it took eight whole weeks after the filing of Intervenors' legal and evidentiary presentation to reach that conclusion. In response to the question of whether a protective order is really necessary, the Staff asserted, somewhat confusingly, that:

On December 16, 2004, the Staff completed its review of documents pertaining to the BLEU project. As a result of its review, the Staff has determined that some documents should be withheld from public disclosure. A list of those documents is attached. Accordingly, the Staff continues to believe that a protective order in this proceeding would be appropriate.

Staff Response at 3. This language indicates that the Staff now seeks a protective order with respect to only the 43 documents that are listed in the attachment to the Response. Yet, the Staff failed to attach a modified draft protective order that would reflect the completion of the Staff's sensitivity review or the limitation on the documents to be covered by the protective order. Thus, the nature of the relief sought by the Staff remains unclear.

On December 29, 2004, the Staff wrote to Judges Rosenthal and Cole, informing them that the public Citrix-based version of ADAMS has been restored to include "non-sensitive, publically-available [sic] documents in the docket for the above-captioned proceeding." The letter also reiterated that the Staff has determined that some documents should be withheld from public disclosure.

### **III. ARGUMENT**

NRC's Subpart L regulations contain no provisions regarding protective orders. 10 C.F.R. § 2.1209 specifies, however, that the Presiding Officer "has the duty to conduct

a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order.” Here, the terms of the protective order sought by the NRC are neither lawful nor fair.

**A. The Proposed Protective Order Is Not Lawful Under The Freedom Of Information Act Or Justified Under NRC Standards For Issuance Of Protective Orders.**

The documents that the NRC Staff seeks to withhold from public disclosure are government records that are subject to the Freedom of Information Act, as implemented in 10 C.F.R. § 2.790(a). Unless a document falls under a specific exemption, or there is a “compelling reason for nondisclosure after a balancing of the interests of the person or agency urging nondisclosure and the public interest in disclosure,” government records must be disclosed to the public. *Id.* While not directly applicable, NRC discovery regulations in Subpart G also require a party seeking nondisclosure to show that “justice requires” a protective order to “protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . .”

In weighing the equities of a requested protective order, the public interest in disclosure of information that bears on the safety or environmental risks of a proposed nuclear operation carries a heavy weight. As the Appeal Board has observed, the “strong public interest” identified by the NRC Commissioners in open, publicly scrutinized rulemaking proceedings:

is no less applicable to adjudicatory proceedings. That interest most assuredly would be disserved were a licensing board or ourselves to place a veil of secrecy over some aspect of a licensing proceeding in the absence of a concrete indication that it was necessary to do so to avoid significant harm to a competing, equally cognizable interest.

*Kansas Gas and Electric Company (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-327, 3 NRC 408, 417 (1976) (hereinafter "Kansas Gas").*

Contrary to these principles, the Staff identifies no legal exception to the public disclosure requirements of the Freedom of Information Act that would sanction the blanket nondisclosure of 43 documents listed in the attachment to the Staff Response, nor does it identify any significant security risk that would outweigh the harm to the public that would be caused by casting a shroud over all information regarding the environmental risks posed by the proposed BLEU Project. Thus, the Staff has failed to justify the issuance of a protective order.

In fact, the Staff has not even disclosed the criteria under which it has judged the information it seeks to protect as "sensitive." Thus, there is no way for the Presiding Officer to determine whether any of the documents do indeed fall under the criteria. It is not clear, for instance, why the Staff seeks a protective order regarding "01/15/02 – Additional Information to Support an Environmental Review for BLEU Project" (1/15/2002), but not any of the Environmental Assessments, which presumably contain the same or similar information. It is also unclear why the Staff seeks a protective order regarding various non-evidentiary pleadings, such as "02/21/03 – Applicant's Answer to Second Request for Hearing by Friends of the Nolichucky River Valley, State of Franklin Group of the Sierra Club, Oak Ridge Environmental Peace Alliance and Tennessee Environmental Council" (2/21/2003), "06/03/04 – Applicant's Request for Clarification of the Issues to be Heard and Statement of Position on the Scope of the Hearing"

(6/3/2004), and “04/22/04 – Applicant’s Opposition to Motion for Appeal of Kathy Helms-Hughes” (4/22/2004).

**B. The Proposed Protective Order Would Impose An Unlawful Prior Restraint On Intervenors’ Counsel.**

In order to protect allegedly sensitive information, the Staff proposes that for the duration of this proceeding, counsel for the Intervenors would be prevented from publicly discussing the contents of NFS’s three license amendment applications, the Integrated Safety Analyses, and the NRC Staff’s Safety Evaluation Reports, among other documents. Because these documents contain the risk estimates that constitute the factual subject matter of this proceeding, the protective order would effectively constitute a blanket gag order against Intervenors’ counsel. As such, it constitutes an unlawful restraint on Intervenors’ freedom of speech under the First Amendment. *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 98-99 (3<sup>rd</sup> Cir. 1988).

**C. The Proposed Protective Order Is Overly Broad.**

The redactions made by the Staff to the exhibits that it filed in support of its legal and evidentiary presentation suggest that the class of information the Staff considers to be “sensitive” is rather narrow. When counsel for Intervenors would not agree to the proposed protective order, the Staff went ahead and filed its legal and evidentiary presentation in redacted form. A review of the Staff’s presentation shows that only the exhibits and not the presentation or supporting affidavit were redacted; and moreover, that the redactions were quite limited. *See, e.g.*, Exhibit 1 at 2-1 (information regarding identification and description of specific buildings redacted), Exhibit 1 at 2-5 (storage tank volumes redacted), Exhibit 1 at 2-7 (concentration of sodium nitrate solution

redacted), Exhibit 1 at 2-8 (volume of environmental discharges redacted). Most of the information in these documents is unredacted, including information relating to the risk estimates that are at issue in this case. The Staff has not explained why, if the sensitivity review has now been completed, it could not seek a much narrower protective order for specific portions of the 43 documents that meet the Staff's sensitivity criteria, rather than all the documents in their entirety.

#### IV. CONCLUSION

Intervenors believe that it is important to protect sensitive information from falling into the wrong hands. In this case, however, the protective order proposed by the Staff is so draconian as to throw an unjustifiable "veil of secrecy" over this entire proceeding. *Kansas Gas*, 3 NRC at 417. The Staff should be required to submit its sensitivity criteria to the Presiding Officer and the parties, and to craft a protective order that more narrowly protects sensitive information without completely obscuring the important subject matter of this proceeding from public view.

Respectfully submitted,



Diane Curran  
Harmon, Curran, Spielberg & Eisenberg, LLP  
1726 M Street N.W., Suite 600  
Washington, DC 20036  
202/328-3500  
FAX: 202/328-6918  
e-mail: [dcurran@harmoncurran.com](mailto:dcurran@harmoncurran.com)

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