

January 19, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
ENTERGY NUCLEAR VERMONT YANKEE	)	Docket No. 50-271-OLA
LLC and ENTERGY NUCLEAR	)	
OPERATIONS, INC.	)	ASLBP No. 04-832-02-OLA
	)	
(Vermont Yankee Nuclear Power Station)	)	

NRC STAFF ANSWER TO ENTERGY'S MOTION FOR PROTECTIVE ORDER  
GOVERNING ACCESS TO AND DISCLOSURE OF TRADE SECRETS AND  
CONFIDENTIAL COMMERCIAL OR FINANCIAL INFORMATION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the Nuclear Regulatory Commission ("Staff") herein answers the motion of applicants Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, "Entergy") requesting that the Atomic Safety and Licensing Board ("Licensing Board") issue a Protective Order governing access to and disclosure of certain information that Entergy claims as trade secrets and confidential commercial or financial information of Entergy, its vendors and its contractors.<sup>1</sup> Although the Staff does not oppose the issuance of an appropriate Protective Order with respect to the intervenors in this proceeding, the Vermont Department of Public Service ("DPS") and the New England Coalition ("NEC"), the Staff requests that Entergy's Protective Order, as proposed, be denied as to the Staff, for the reasons set forth below.

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<sup>1</sup> See "Entergy's Motion for Protective Order Governing Access to and Disclosure of Trade Secrets and Confidential Commercial or Financial Information," dated January 12, 2005 ("Motion").

## BACKGROUND

On or about January 5, 2005, counsel for Entergy, Mr. Jay Silberg, contacted Staff counsel on the subject of the treatment of potentially proprietary information that would be subject to production as part of Entergy's mandatory disclosures pursuant to 10 C.F.R. § 2.336(a). Mr. Silberg indicated that there was a voluminous amount of potentially proprietary material included in Entergy's mandatory disclosures, the bulk of which had *not* previously been submitted to the NRC pursuant to 10 C.F.R. § 2.390.<sup>2</sup> At that time, Mr. Silberg indicated Entergy's desire to enter into confidentiality and non-disclosure agreements with the parties in order to disclose the information for use in this proceeding, while protecting it from public disclosure. Entergy filed its original Motion on January 12, 2005. Entergy subsequently withdrew the Motion on January 18, 2005, upon filing an amended Motion after reaching agreement with DPS and NEC.<sup>3</sup> For the reasons set forth below, the Staff does not believe the protective order, as proposed, would provide a sufficient legal basis for the Staff to withhold the affected information from public disclosure.

## DISCUSSION

As stated above, the Commission's procedures governing the submission of proprietary information are set forth at 10 C.F.R. § 2.390. Under that rule, material determined to be proprietary generally will be protected by the NRC, and will not be released to the public. Pursuant

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<sup>2</sup> Section 2.390 sets forth the Commission's procedures for submission and review of documents sought to be withheld from public disclosure because they contain trade secrets, privileged, or confidential commercial or financial information.

<sup>3</sup> See "Entergy's Amended Motion for Protective Order Governing Access to and Disclosure of Trade Secrets and Confidential Commercial or Financial Information," dated January 18, 2005 ("Amended Motion"). In the Amended Motion, Entergy represents (at 1-2) that all parties agreed to the modified Protective Order. Entergy kept the Staff abreast of the revisions to the proposed Protective Order, and the Staff did not object to any modifications to the Protective Order as they would apply to other parties. However, as discussed herein, the Staff at no point agreed that the Protective Order should apply as to the Staff.

to 10 C.F.R. § 2.390(b)(1)(ii) and (iii), a person who proposes that the Commission withhold a document from public disclosure on the ground that it contains proprietary information must submit, among other things, an affidavit setting forth the specific reasons why the document is considered to contain proprietary information, the release of which would cause harm to the competitive position of the owner of the information. If the Staff determines that the information submitted contains trade secrets, commercial or financial information that is confidential according to the information provided by the owner, then, pursuant to 10 C.F.R. § 2.390(b)(5), the Staff must determine (1) whether the right of the public to be fully apprised of the proposed action outweighs the demonstrated concern for protection of a competitive position; and (2) whether the information should be withheld. *See* 10 C.F.R. § 2.390(b)(5). Both the Staff and the Licensing Board have the authority to make proprietary determinations pursuant to these requirements.<sup>4</sup>

Section 2.390 applies in tandem with the agency's regulations in 10 C.F.R. Part 9 implementing the Freedom of Information Act ("FOIA").<sup>5</sup> It is the Staff's position that, in order to withhold documents from public disclosure under Section 2.390 (and under the FOIA regulations in 10 C.F.R. Part 9), either the Staff or the Licensing Board must make the requisite proprietary determination under that section. Under the Protective Order as proposed by Entergy, documents *identified by Entergy as proprietary* shall be "deemed to contain proprietary trade secrets and commercial and financial information required to be held in confidence pursuant to the policy reflected in 10 C.F.R. §§ 2.390(a)(4) and 9.17(a)(4)." *See* Memorandum and Order

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<sup>4</sup> *See* 10 C.F.R. § 2.390(f); *Private Fuel Storage, L..L.C.* (Independent Spent Fuel Storage Installation), CLI-05-01, 61 NRC \_\_\_, slip op. January 5, 2005; *Wisconsin Elec. Power Co.* (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-42, 15 NRC 1307 (1982).

<sup>5</sup> *See* 10 C.F.R. § 9.17(a)(4), excluding from public disclosure "trade secrets and commercial or financial information obtained from a person that are privileged or confidential."

(Protective Order) (appended as an attachment to Entergy's Motion), at ¶ 1.<sup>6</sup> The Staff does not believe that such a blanket designation of documents as proprietary, without any review as to their content, is sufficient to justify withholding under 10 C.F.R. § 2.390 and NRC's FOIA regulations. See 10 C.F.R. § 9.17(a)(4).

The issue raised by Entergy's Motion is one of first impression to the Staff under the recently-revised 10 C.F.R. Part 2 rules of practice.<sup>7</sup> The mandatory disclosure provisions, an innovation of the revised rules, are part of a tiered approach to discovery that is intended to reduce delays and resources expended in discovery. See 69 Fed. Reg. at 2194 col. 3. Under the new rules, the Staff is presented with a category of documents it generally did not receive in adjudications under the "old" procedural rules.

In view of the goals of the revised rules of practice, the Staff does not wish to elevate regulatory form over substance and create an unnecessary administrative burden on any of the parties to this proceeding. In its Motion, Entergy states that production of the documents in question under Section 2.390 would be "extraordinarily burdensome on the producing party and may impair its ability to comply with the requirements of 10 C.F.R. § 2.336(a) in a timely manner."

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<sup>6</sup> In its Motion, Entergy notes that the proposed Protective Order "is closely patterned after one recently proposed by the NRC Staff in another proceeding." However, the referenced protective order was proposed in the ongoing *Nuclear Fuel Services, Inc.*, ("NFS") materials proceeding, which involves circumstances quite different from those at issue here. In that proceeding, the Staff proposed the Protective Order to provide access to documents in the Electronic Hearing Docket and hearing file that had been made temporarily unavailable to the public due to the agency's ongoing security review. The request *did not* pertain to proprietary information. See "NRC Staff Motion for Protective Order Governing Disclosure of Sensitive Information," dated December 20, 2004 (NRC ADAMS Accession Number ML050050427). (The Staff's request has been held in abeyance by the Presiding Officer in that proceeding.) An earlier protective order for proprietary information, granted by the Presiding Officer on May 18, 2004, pertained to information already designated - or to be designated - proprietary by the NRC Staff pursuant to Sections 2.790(a)(4) and (b)(6) [now §§ 2.390(a)(4) and (b)(6)]. See "Joint Motion for Protective Order Governing Non-Disclosure of Proprietary Information," dated May 14, 2004 (ADAMS Accession Number ML041400484).

<sup>7</sup> See Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004).

Motion at 3. The Staff has discussed with counsel for Entergy a compromise position, under which the Staff and Entergy would proceed as follows: Rather than producing the potentially proprietary documents to the Staff in their entirety under a Protective Order, Entergy would retain a set of the documents at its counsel's office for inspection by the Staff. The Staff would then inspect the documents and identify a list, most likely a subset of the documents in question, for production to the Staff. These documents would then be submitted to the agency pursuant to the procedures of 10 C.F.R. § 2.390, and would be dispositioned thereunder.

Because the NRC is subject to the requirements of FOIA, the Staff is reluctant to enter into contractual arrangements that could potentially impose additional withholding obligations on the Staff that might be inconsistent with FOIA obligations. However, the intervenors in this proceeding are not similarly constrained. As such, the Staff does not oppose issuance of the modified Protective Order as to DPS<sup>8</sup> and NEC.<sup>9</sup>

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<sup>8</sup> The Staff takes no position as to the ability of DPS to enter into, and be bound by, a confidentiality and non-disclosure agreement vis-à-vis applicable State freedom of information laws.

<sup>9</sup> Certain documents in the Staff's hearing file and mandatory disclosures, produced yesterday, have been determined to be proprietary pursuant to 10 C.F.R. § 2.390 and are not available to the public. Redacted versions of most of those documents are publicly available as part of the Staff's hearing file. In the absence of a current Protective Order, the Staff presented to the Licensing Board and parties, as part of its initial disclosures, a privilege log of those documents subject to protected status as proprietary. See Letter to the Administrative Judges from Brooke D. Poole, transmitting the hearing file and mandatory disclosures, dated January 18, 2005, Attachment 1.

CONCLUSION

For the foregoing reasons, the Staff requests that the Licensing Board deny the Motion as to the Staff, and approve the Staff's alternate proposal for the review and disposition of Entergy's potentially proprietary information subject to production as mandatory disclosures in this proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brooke Poole". The signature is written in a cursive style with a large initial "B".

Brooke D. Poole  
Counsel for NRC Staff

Dated in Rockville, Maryland  
this 19<sup>th</sup> day of January 2005

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OPERATIONS, INC.	)	ASLBP No. 04-832-02-OLA
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO ENTERGY'S MOTION FOR PROTECTIVE ORDER GOVERNING ACCESS TO AND DISCLOSURE OF TRADE SECRETS AND CONFIDENTIAL COMMERCIAL OR FINANCIAL INFORMATION" in the captioned proceeding have been served on the following by deposit in the United States mail, first class; or as indicated by an asterisk (\*), by deposit in the Nuclear Regulatory Commission's internal mail system; and by e-mail as indicated by a double asterisk (\*\*), this 19<sup>th</sup> day of January, 2005.

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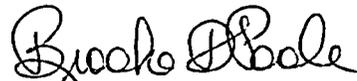
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Respectfully submitted,



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