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WINSTON & STRAWN LLP

7

35 WEST WACKER DRIVE  
CHICAGO, ILLINOIS 60601-9703

43 RUE DU RHONE  
1204 GENEVA, SWITZERLAND

CITY POINT  
1 ROPEMAKER STREET  
LONDON, EC2Y 9HT

MARK J. WETTERHAHN  
(202) 371-5703  
mwetterhahn@winston.com

1400 L STREET, N.W.  
WASHINGTON, D.C. 20005-3502

(202) 371-5700

FACSIMILE (202) 371-5950

www.winston.com

March 28, 2005

333 SOUTH GRAND AVENUE  
LOS ANGELES, CALIFORNIA 90071-1543

200 PARK AVENUE  
NEW YORK, NEW YORK 10166-4193

21 AVENUE VICTOR HUGO  
75118 PARIS, FRANCE

101 CALIFORNIA STREET  
SAN FRANCISCO, CALIFORNIA 94111-5894

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March 28, 2005 (2:34pm)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Secretary  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Re: RIN3150-AH57

Gentlemen:

On February 11, 2005, the U.S. Nuclear Regulatory Commission ("NRC") published in the Federal Register (70 Fed. Reg. 7196) a proposed rule relating to the protection of Safeguards Information ("SGI"). The stated purpose of the proposed rule is to protect SGI from inadvertent release and unauthorized disclosure which might compromise the security of nuclear facilities and materials. The Federal Register Notice invited comments to be submitted by March 28, 2005. Winston & Strawn LLP<sup>1</sup> submits the following comments.

Winston & Strawn and its nuclear utility clients have experience in the practical aspects of dealing with Safeguards Information, including the use of such material at facilities, during interactions with the NRC Staff, and during adjudicatory hearings involving security-related issues. Nuclear utilities, as a group, may be significantly affected by the proposed rule. With this as background, Winston & Strawn wishes to comment on some overarching policy issues relating to the safeguarding of sensitive material relating to nuclear power plants and nuclear material and then comment on specific aspects of the rule.

<sup>1</sup> Winston & Strawn is a law firm which represents utilities, which are the owners and operators of commercial nuclear power plants and which would be among the groups most directly affected by the petition for rulemaking.

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### Overall Comments

Since the events of September 11, 2001, the NRC has been emphasizing the requirements for the protection of nuclear power plants against sabotage of nuclear plants and the theft of nuclear materials. It has imposed new requirements relating to security and safeguarding of sensitive information by order and, in parallel, has greatly expanded its definition of information which it considers sensitive.

The number of categories of information to be withheld has also grown with only limited guidelines as to the level of protection needed for a given piece of information. For example, the NRC has requested that detailed drawings of a nuclear plant be withheld from public disclosure as sensitive and has used a category of "Official Use Only" documents to convey some security-sensitive information to licensees. However, there is little guidance as to the criteria for the selection of the particular category into which a particular document or piece of information would fall, no overall regulatory scheme to protect such documents from disclosure, nor sanctions for inappropriate disclosure.

In conjunction with a revision to its regulations regarding 10 C.F.R. §§ 73.21, 73.22 and 73.23, the Commission should not focus only on the two categories discussed herein, SGI and SGI-M, in isolation. It should set ground rules for protection of other levels of information which could be useful to an individual or group seeking to commit theft or radiological sabotage.

While the proposed rule contains some mention of the use of Safeguards Information in NRC adjudicatory proceedings (*see, e.g.*, the discussion of 10 C.F.R. § 2.709), the matter is not approached in a comprehensive manner with sufficient sensitivity given to the differences between the normal treatment of Safeguards Information at a nuclear or other licensee facility and the protection to be afforded such SGI as part of the hearing process. Two recent NRC adjudicatory hearings have involved the use of extensive amounts of Safeguards Information. Undoubtedly, given the interest in the subject of security at nuclear power plants and the fact that the scope of materials which have been designated as SGI or other sensitive category has increased, it is likely that the number of hearings involving Safeguards Information will increase. Therefore, a more systematic approach to this hearing process should be instituted. It is not sufficient for presiding Atomic Safety and Licensing Boards to set *ad hoc* requirements by Order in each new proceeding. Specific requirements tailored to the adjudicatory framework should be set by rule.

For example, whereas the present SGI rule provisions regarding external transmission of documents and materials would allow a messenger/courier to deliver double wrapped material containing SGI, the proposed rule would eliminate the "messenger/courier" category and require transport by a commercial delivery company that provides nationwide

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overnight service with computer tracking features, U.S. First Class, Registered Express or Certified mail or by any individual authorized access pursuant to these requirements. Often, adjudicatory documents are required to be prepared on tight deadlines and be delivered to the NRC and other parties by the close of business on a certain date. Under the proposed rule, the only way to do that would be to utilize someone who has access to the Safeguards Information, which is usually an extremely small set of individuals. There seems to be no reason why a double wrapped package with no indication that Safeguards Information is contained inside cannot be delivered by a messenger/courier who physically delivers the material to its recipient and obtains a written receipt or by trusted law firm personnel.

Another example is the requirement for portion marking of correspondence with the NRC. If pleadings to a presiding officer or the Commission are considered such correspondence, considerable additional effort would be needed to portion mark the sections containing Safeguards Information. Little utility appears to be added. Moreover, intervenors in licensing proceedings have a general reluctance to designate a particular piece of information as non-safeguards, believing they will be second-guessed by the licensee or NRC Staff. Moreover, since the Safeguards Information in a pleading is usually integral to the entire pleading such that removal of such information would render the remainder of marginal or no use, if released. Furthermore, for a pleading, the requirement to designate the individual making the safeguards determination is redundant and unnecessary. Clearly, that determination can be attributed to the individual who signs the pleading which is also required to be dated.

The determination as to reliability and trustworthiness of individuals participating in an adjudicatory hearing is not appropriately addressed by the new rule. As we read the revised rule, if it is the licensee's document containing SGI being surrendered to an intervenor, *e.g.*, as part of the discovery process, then it is the licensee who must make the reliability and trustworthiness finding. There is no reason for this clearance process in adjudicatory proceedings to be laid at the feet of the licensee. Moreover, it is not clear under the proposed regulations whether a presiding officer such as a Licensing Board would have the duty to make a determination as to reliability and trustworthiness upon application of an intervenor for access to Safeguards Information or whether it would consider an appeal of a party's determination. If such a determination requires more than a FBI fingerprint check, it is not clear how a Licensing Board would gather the requisite information and make that determination. For these reasons, the Commission should rethink the application of these criteria to adjudicatory hearing matters and resolve such issues by separate rulemaking or by issuing Commission orders in each case where Safeguards Information might be an issue to control the dissemination and use of SGI.

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### Specific Comments

#### Section 73.2 Definitions

Under the proposed rule, the definition of *trustworthiness and reliability* means “positive attributes as an indication of an individual’s background and character demonstrating a high level of confidence that the individual can be properly authorized to have access and handle Safeguards Information and Safeguards Information – Modified Handling.” It is not clear how this requirement will be uniformly applied for all classes of individuals. For those having unescorted access to a nuclear power plant, that standard would presumably be met by the ongoing access authorization program required by the Commission’s regulations and any applicable orders. However, there are individuals at utilities needing access to SGI who may not have been granted unescorted access or have allowed that access to lapse for administrative reasons. The proposed rule is not clear as to whether there is a necessity for continued monitoring of trustworthiness and reliability, *i.e.*, the same as for individuals having unescorted access, in order to satisfy this definition. For example, does the determination have to be periodically revisited and what standards must be placed on the individual to self-report any arrests or other negative attributes which may be an indication that the necessary high level of confidence that the individual is reliable and trustworthy is not present on a continuing basis.<sup>2</sup> For handling Safeguards Information, it is not clear whether an individual who is not a utility employee and does not have unescorted access, *e.g.*, an attorney for the utility (or an intervenor), has to undergo a process akin to the process for individuals obtaining unescorted access.

#### Section 73.22 – Protection of Safeguards Information: Specific Requirements

Section 73.22(a)(1)(iv) requires written physical security orders and procedures for members of the security organization to be Safeguards Information. Some licensees do not consider all security-related procedures to be SGI. Some procedures are more general and do not require such protection. Moreover, designation of all procedures as Safeguards Information would affect the ability to train individuals. This section should be modified to allow flexibility in the designation of security procedures. Subsection (xii) requires that a number of classes of documents be covered if disclosure of such information “could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of theft, diversion, or sabotage of material or a facility.” This criterion is not sufficiently precise so as to alert a licensee as to the type of

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<sup>2</sup> It is not clear whether a continuing behavioral observation program is an element in this process.

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information to be protected, and it exposes such a licensee to second-guessing or enforcement action.<sup>3</sup>

Section 73.22(b)(1)(vii) requires a licensee to demonstrate trustworthiness and reliability for an individual to whom disclosure is ordered pursuant to § 2.709(f) of this chapter. As discussed above, a licensee may not wish to make this finding for an individual who is seeking to intervene in the proceeding, presumably against the licensee's proposal. Moreover, intervenors may be reluctant to give detailed personal information of the type usually needed and obtained by a licensee to grant access authorization.

Section 73.22(d)(i), "preparation and marking of documents or other matter." As discussed above, the requirements of this section are not necessary for documents which are pleadings in an adjudicatory proceeding inasmuch as the signatory is obviously providing this function.

Section 73.22(d)(ii), "portion marking." As discussed above, the requirement in adjudicatory hearings for portion marking of any adjudicatory material has not been demonstrated to be worth the time and effort to accomplish it. Therefore, the reach of this requirement should be appropriately limited.

Section 73.22(d)(iv) states that documents and other matter containing Safeguards Information in the hands of contractors and agents of licensees that were produced more than one year prior to the effective date of this amendment need not be marked unless they were removed from storage containers for use. There is no basis for requiring SGI documents produced in the last year prior to the effective date of the rule to conform to the marking requirements contained in the rules. To the extent that these new requirements are different from the existing ones, they are minor. The regulation should not require the conduct of an extensive review of documents produced within the last year prior to the promulgation of the final rule.

10 C.F.R. § 73.22(d)(v) requires the use of the marking "SGI" for Safeguards Information designated as such for the protection of material covered by 10 C.F.R. § 73.22.<sup>4</sup> This initialism might be confusing, and it's not clear how this is utilized in the remainder of the rule. The single designation "Safeguards Information" or "Safeguards Information – Modified" should be used for all marking of documents. This would tend to alert a broader class of individuals that special requirements are necessary.

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<sup>3</sup> The same issue arises in 10 C.F.R. § 73.23(a)(1)(x) and (a)(2)(v).

<sup>4</sup> See also 10 C.F.R. § 73.23(d) for a similar requirement.

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Section 73.22(d)(v) appears to be inconsistent with the (d)(i); (d)(i) requires that "Safeguards Information" be marked in a conspicuous manner on the top and bottom of each page of a document to indicate the presence of protected information. Subsection (v) requires the marking "SGI" must be used for Safeguards Information designated as such for the protective facilities and materials covered by 10 C.F.R. § 73.22. This appears to be inconsistent. The "SGI" designation may not alert someone who is not familiar with that initialism to the fact that it is Safeguards Information. The inconsistency should be eliminated.

Section 73.22(i) seemingly permits the use of strip shredders for destruction if prices are one-half inch or less and mixed. This is inconsistent with advice given by certain NRC Staff members who believe that a cross-cut shredder must be utilized. This should be clarified.

Section 73.23(b)(1)(i). The licensee must demonstrate trustworthiness and reliability through a comprehensive background check or other means as approved by the Commission. As discussed above in the general comments, it is not clear how this provision would be applied to all categories of individuals needed access to SGI or SGI-modified material

Conclusion

Please feel free to contact me if you have any questions regarding these comments.

Sincerely,  
  
Mark J. Wetterhahn

**From:** "Wetterhahn, Mark" <MWetterhahn@winston.com>  
**To:** "Secretary (E-mail)" <SECY@nrc.gov>  
**Date:** Mon, Mar 28, 2005 10:40 AM  
**Subject:** RIN3150-AH57

Enclosed for filing are Winston & Strawn's comment on proposed rulemaking relating to Safeguards Information published in the Federal Register on February 11, 2005 (70 Fed. Reg. 7196).

Please note that as of April 4, 2005, Winston & Strawn's address will be:  
1700 K Street, N.W., Washington, D.C. 20006, and my telephone number will be (202) 282-5703.

Mark J. Wetterhahn  
Winston & Strawn LLP  
mwetterh@winston.com  
(202) 216-8620

<<comments.pdf>>

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