

SPIEGEL & MCDIARMID LLP

GEORGE SPIEGEL (1919-1997)
ROBERT C. MCDIARMID
ROBERT A. JABLON
JAMES N. HORWOOD
FRANCES E. FRANCIS
DANIEL I. DAVIDSON
THOMAS C. TRAUGER
JOHN J. CORBETT
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LISA G. DOWDEN
RISE J. PETERS*
*DECEASED MAY 2, 2007
PETER J. HOPKINS
DAVID E. POMPER
MARK S. HEGEDUS
WILLIAM S. HUANG
PABLO O. NÜESCH
TILLMAN L. LAY
LARISSA A. SHAMRAJ

1333 NEW HAMPSHIRE AVENUE, NW
WASHINGTON, DC 20036

WWW.SPIEGELMCD.COM

Telephone 202.879.4000
Facsimile 202.393.2866
E-mail INFO@SPIEGELMCD.COM

ASSOCIATES
STEPHEN C. PEARSON
ELAINE C. LIPPMANN
J.S. GEBHART
RUBEN D. GOMEZ
REBECCA J. BALDWIN
SHARON COLEMAN*
*MEMBER OF THE CA BAR ONLY
OF COUNSEL
ALAN J. ROTH (1933-2003)
PAUL N. CONNOR
MARGARET A. MCGOLDRICK
MARGARET A. MEISER
JEFFREY A. SCHWARZ
BARRY M. SMOLER
GLORIA TRISTANI**
LEE C. WHITE
*** MEMBER OF THE CO AND NM BARS ONLY

November 9, 2007

Via Hand Delivery

Mr. Luis A. Reyes
The Executive Director for Operations
FOIA/Privacy Act Officer
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

FOI/PA REQUEST
Case No. 2008-0002A
Date Rec'd: 11-9-07
Specialist: Winters
Related Case: 2007-0313

Re: Appeal of Utility Workers Union of America, AFL-CIO, Local 369 of October 16, 2007 FOIA/PA Determination Pursuant to 10 C.F.R. §§ 9.25(g), 9.25(h), 9.65(b)

Dear Mr. Reyes:

Pursuant to 10 C.F.R. §§ 9.25(g), 9.25(h), 9.65(b), Local 369, Utility Workers Union of America, AFL-CIO ("Local 369" or "Union") hereby appeals the October 16, 2007 determination of Russell A. Nichols, Freedom of Information Act ("FOIA") and Privacy Act Officer, denying in part an August 28, 2007, FOIA request by Local 369 seeking "certain records related [to] communications between the Commission and Entergy Nuclear Operations, Inc." Letter from Daniel F. Hurley, Secretary-Treasurer, Local 369 to FOIA Officer, NRC (Aug. 28, 2007). The Nuclear Regulatory Commission ("the Commission") has withheld from disclosure an August 1, 2007, 80-page document entitled "Vermont Yankee Management Alternative Plan" ("the Plan") pursuant to FOIA Exemption 4, which exempts "[t]rade secrets and commercial or financial information obtained from a person that are privileged or confidential." 10 C.F.R. § 9.17(a)(4); 5 U.S.C. § 552b(c)(4) ("Exemption 4"). The October 16, 2007 determination concluded that the Plan falls within Exemption 4 because "[t]he information is considered to be confidential business (proprietary) information." Response to Freedom of Information Act (FOIA)/Privacy Act (PA) Request, FOI/PA No. 2007-0313 (Oct. 16, 2007).

For the reasons stated *infra*, Local 369 asserts that Exemption 4 does not apply, asks that Mr. Nichols' decision be reconsidered and reversed, and requests that the Plan be released.

OVERVIEW

While (to state the obvious) Local 369 has not seen the Plan, our understanding is that the Plan is in fact the strike contingency plan for the Vermont Yankee Nuclear Power Station ("the Plant"). Assuming this is the case, then the Plan should contain information on how, in the event of a work stoppage (and in the absence of the complete complement of experienced workers), the Plant will be operated in accordance with all applicable regulatory requirements.

For several reasons, the Plan does not appear to fall within FOIA Exemption 4:

- The Plan does not appear to contain "confidential" business information within the meaning of Exemption 4.
- The contents of the Plan are not within the scope of the material customarily treated as "confidential" business information by the Commission.
- Even if the contents of the Plan were "confidential," a balancing of the public's right to be appraised of the safety and emergency regimen that would be put in place for the Plant by Entergy Nuclear Operations, Inc. ("Entergy") in the event of a work stoppage outweighs Entergy's business interest in protecting its competitive position.

I. The Plan Does Not Appear to Contain "Confidential" Business Information within the Meaning of Exemption 4.

The FOIA mandates that the Plan be disclosed because the Commission has not met its burden to establish that the requested information is protected by Exemption 4. 5 U.S.C. § 552, *et seq.*; *FBI v. Abramson*, 456 U.S. 615, 632 (1982). Exemption 4 is applicable only where the NRC is able to demonstrate that the information is "(a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential." *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974), *appeal after remand*, *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673,679 (D.C. Cir. 1976) (relied on by the Commission in *Private Fuel Storage L.L.C.*, CLI-05-01, 2005 WL 4131551 at *3 n.13 (Jan. 5, 2005).

The October 16, 2007 determination concluded that the Plan falls within 5 U.S.C. § 552b(c)(4), because "[t]he information is considered to be confidential business (proprietary) information." Response to Freedom of Information Act (FOIA)/Privacy Act (PA) Request, FOI/PA No. 2007-0313 (Oct. 16, 2007). However, the Plan does not

appear to contain “confidential” business information within the meaning of Exemption 4, because the Commission has not established that its disclosure of the material, previously submitted to the Commission under compulsion of law, would (1) impair the Commission’s future ability to obtain necessary information from Entergy; (2) impair other government interests such as compliance, program efficiency and effectiveness, and the fulfillment of the Commission’s statutory mandate, or (3) cause substantial harm to Entergy’s competitive position. The NRC has made clear that absent these showings, disclosure is the proper course. *Private Fuel Storage*, 2005 WL 4131551 at *2, *3.

A. *The Plan Appears to Contain Information that Must Be Regularly Submitted to the Commission under Compulsion of the Law.*

When determining whether information in the government’s possession is to be treated as confidential under Exemption 4, the D.C. Circuit Court of Appeals distinguishes voluntarily submitted information from that which is submitted under compulsion (e.g. under force of law). *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (internal quotes omitted) (relied on by the Commission in *Private Fuel Storage*, 2005 WL 4131551 at *3 (“[W]e look for guidance to the plentiful federal case law on that Exemption [(i.e. Exemption 4)]”). *See also National Parks*, 498 F.2d at 766. If the materials were submitted to the government under compulsion, then the Commission must show that its disclosure would impair the Commission’s future ability to obtain necessary information from Entergy, impair other governmental interests, or cause substantial harm to Entergy’s competitive position. *Critical Mass*, 975 F.2d at 879; *see also Private Fuel Storage*, 2005 WL 4131551 at *2,*3.

As a threshold matter, the contents of the Plan appear to contain information that Entergy is required by law to submit to the Commission in accordance with the NRC Inspection Manual Inspection Procedures. *See* NRC Inspection Manual, Inspection Procedures 92709 & 92711 (2005) (*referencing*, 10 C.F.R. §§ 40.31, 50.34, 50.47, 50.54, 50 Appendix E, 55.31, 55.53, 60.160, 70.22, 73 Appendix C). Specifically, the Inspection Procedures identify “evaluat[ion of] the licensee’s long term implementation of the strike contingency plans” as a primary inspection objective. Inspection Procedure 92711-01, *see also*, Inspection Procedure 92709-01. The inspector must also “keep abreast of any contingency plan changes or contingency plans that are approved by the licensee prior to or during the strike” including “changes to the licensee’s safeguards contingency plan which have not been reviewed by the NRC.” Inspection Procedure 92709-03.01 & 92709-03.01.02.

For these reasons, and in compliance with the Inspection Procedures promulgated under 10 C.F.R. §§ 40.31 *et al.*, the Plan appears to contain information Entergy is required by law to submit to the Commission. Therefore, the Commission cannot justify disclosure unless it can satisfy the D.C. Circuit Court of Appeals standard for properly withheld “confidential” information submitted to the government under compulsion.

B. *There Has Been No Showing that Disclosure of the Plan Would Impair the Commission's Ability to Obtain Necessary Information from Entergy in the Future.*

The Plan cannot properly be characterized as “confidential” business information because there has been no showing that its disclosure would impair the Commission’s future ability to obtain necessary information from Entergy. *Private Fuel Storage*, 2005 WL 4131551 at *3. Information disclosure has and continues to be legally mandated throughout the process of licensing and operation of the Plant (*See, e.g.* Inspection Procedures 92709 & 92711; 10 C.F.R. §§ 2.101, 20.2207, 50.54, 50.71). Thus, the Commission possesses ample statutory authority to obtain necessary information by compulsory means. *See Critical Mass*, 975 F.2d at 885 n.5.

As explained by the D.C. Circuit, where an entity is “required to provide ... information to the government, there is presumably no danger that public disclosure will impair the ability of the Government to obtain this information in the future.” *National Parks*, 498 F.2d at 770. Entergy, as holder of the operating license for the Plant, is required to submit the Plan to the Commission. *See* Inspection Procedures 92709 & 92711. Because disclosure is required, the Commission retains the ability to obtain necessary information from Entergy after disclosure of the Plan.

Furthermore, the Commission has not shown that the quality of strike preparation plans provided to the Commission in the future might decrease in value after disclosure of the Plan. *See Critical Mass*, 975 F.2d at 878 (“[W]hen dealing with a FOIA request for information the provider is required to supply, the governmental impact inquiry will focus on the possible effect of disclosure on its quality.”) The Commission requires every detail of a plan to be reviewed and evaluated for quality, changes, and overall impact. For example, a Commission inspector must “[d]etermine the adequacy of the licensee’s ... plans” (Inspection Procedure 92709-02.01), “discuss with licensee’s management the overall impact of the ... plan[ning]” (Inspection Procedure 92709-03.01), and “evaluate changes to the licensee’s safeguards contingency plan” (Inspection Procedure 92709-03.02). *See also Region I Instruction 1080.2, Revision 6, NRC Preparations for Pending Licensee Strike* (“RI 1080.2/6”) (“The NRC evaluates the licensee’s plan of intended operation ... during the strike period.”). Given the Commission’s close scrutiny of strike preparation plans, there is no basis on which to find that the disclosure of the Plan at issue would result in a diminution in the quality of future plans submitted by Entergy. Absent a showing that disclosure would discourage Entergy from diligently providing the Commission with high quality information, the Plan at issue must be disclosed.

C. *There Has Been No Showing That Disclosure of the Plan Would Impair Other Commission Interests.*

The plan is not “confidential” business information, because there has been no showing by the Commission that disclosure would impair its general interests in

compliance, program efficiency and effectiveness, or the fulfillment of the Commission's statutory mandate. *Private Fuel Storage*, 2005 WL 4131551 at *2, *3. Entergy's dual interests in the continued operation of the Plant and in promoting the public safety demand Entergy's continued cooperation with the Commission to ensure efficient and effective Plant regulation and compliance with Commission regulations in accordance with the Commission's statutory mandates. There has been no claim, let alone a demonstration, that Entergy's cooperation and commitment would be impaired by the release of the Plan. In fact, there are strong indications to the contrary.

In the event of a strike, the continued and close cooperation between Entergy and the Commission is required by the Region I Instructions in order to meet the common goal of ensuring public safety. RI 1080.2/6. The Region I Instructions further guide the Commission's inspectors to contact Entergy management, obtain periodic updates on strike status, discuss security and proficiency issues with Entergy management, and continue both on- and off-site observation of the strike activities in coordination with Entergy. RI 1080.2/6. Thus, Entergy's interest in cooperation with the Commission in fact would be heightened during periods of strike activity.

Entergy's obvious interest in compliance with Commission procedures and requirements to ensure the continued safe operation of the Plant is a powerful incentive for Entergy to continue to cooperate with the Commission. Therefore, disclosure of the contents of the Plan are not likely to impair government interests in compliance, efficiency, effectiveness and the Commission's statutory mandates.

D. *There Has Been No Showing that Disclosure of the Plan Would Cause Substantial Competitive Injury to Entergy.*

Local 369 asserts that Exemption 4 cannot apply absent a showing that the Plan contains information that would result in "substantial competitive injury" to Entergy as a result of efforts by either competitors or non-competitors. As no such showing has been made, the Plan cannot reasonably be deemed "confidential" business information within the meaning of Exemption 4. *Private Fuel Storage*, 2005 WL 4131551 at *3.

The information requested by Local 369 is probably a plan for situations in which the plant must operate on reduced or temporary staff (such as in the event of a strike). It appears to be a document that addresses matters of public safety such as emergency preparedness, physical security and fire operations. Memo to David C. Lew, Director Division of Reactor Projects, from Raymond J. Powell, Chief RA (Aug. 16, 2007). Absent some additional showing, the information in the Plan does not appear to be within the set of market, strategy, and financial materials that could conceivably cause substantial harm to Entergy's business interests or profits.

II. There Has Been No Showing that the Contents of the Plan are Customarily Treated by the Commission as “Confidential” Business Information under Exemption 4.

The Plan is not properly exempted from disclosure under Exemption 4 because there has been no showing that its contents are the type of material customarily treated as “confidential” business information by the Commission.

Our understanding is that the Plan details steps for handling an emergency situation, such as a strike, in which the number of regular staff is reduced. It may include, for example, a timeline detailing the stages of Entergy’s plan to train and install substitute staffing absent its regular complement of experienced workers. Thus, it likely contains information about staff functions similar to that disclosed in response to recent FOIA requests. For example, a proposal to amend staffing requirements as part of the Pilgrim Nuclear Power Station emergency plan was disclosed by the Commission in 2006. *Pilgrim Nuclear Power Station Emergency Plan Changes to the Minimum Staffing Requirements for the Emergency Response Organization (ERO)*, Accession No. ML060100456 (Jan. 3, 2006). The proposal described changes to the RP Technician and RP/Radio Chem Technician positions, outlined the specific tasks to be performed by the positions, described the implications and impact of the changes, explained how the changes were made in accordance with NRC regulations, and described minimum qualifications and training requirements for the positions. *Id.* at Letter to NRC from Entergy, 2.05.086 (Jan. 3, 2006). Similarly, Local 369 seeks to obtain information explaining changes to regular staff positions during a strike, the implications and impact that temporary employees would have on operation of the Plant, how such changes would comply with NRC regulations, and how Entergy would ensure that temporary staff meet minimum qualifications and obtain the requisite training for the positions. In addition, other information impacting staff functions in emergency situations were released this year. *See, e.g., Clinton site emergency plan, two letters from utility dated June 30, 2006, & December 19, 2006, re: NRC’s safety evaluation*, FOI/PA No. 2007-0187 (Apr. 26, 2007) (detailing how relocation of the Technical Support Center would strengthen the performance of Emergency Response Organization staff positions). Thus, in accordance with the prior practice of the Commission and FOIA, the Plan is not exempted from disclosure under Exemption 4.

III. Alternatively, Even if Found to Be “Confidential,” the Public’s Right to Review the Plan Outweighs Entergy’s Interests in Protecting Their Competitive Position.

The Congressional intent behind the FOIA was to establish “a general philosophy of full agency disclosure ... put into practice” to “help ensure an informed citizenry, vital to the functioning of a democratic society.” *Dep’t. of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 16 (2001) (internal citations omitted). Even if the Commission determines that the Plan contains confidential business information, the

right of the public to be fully appraised of the Plan “outweighs the demonstrated concern for protection of a competitive position” (10 C.F.R. § 2.390) and should therefore not be withheld from public disclosure.

Local residents of Vernon, VT, the city in which the Plant is located, have expressed concern about the operation of the plant in the event of a strike, particularly if replacement workers must work long hours at unfamiliar jobs in an unfamiliar reactor. *Yankee Workers Threaten Walkout*, Rutland Herald, Aug. 17, 2007, available at <http://www.rutlandherald.com/apps/pbcs.dll/article?AID=/20070817/NEWS02/70816014>. The public has a right to know how Entergy plans to comply with the Plant’s operating license, applicable NRC regulations, and fulfill practical requirements for the Plant’s safe operation in the event of a strike.

Entergy’s ability to meet its obligation to operate the facility in the possible event of a strike is a matter of great public import and concern, and Entergy must be held publicly accountable to both this Commission and to the residents of Vernon. The public’s right to be fully appraised of the contents of the Plan outweighs any concern Entergy might have for the protection of its competitive position, assuming it can be shown that this position would be endangered by disclosure.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, UWUA Local 369 requests that the instant appeal be granted, and that the NRC disclose, pursuant to the FOIA, the challenged Vermont Yankee Management Alternative Plan.

Sincerely,



Scott H. Strauss
Attorney for Utility Workers Union
of America, Local 369