

March 19, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
NORTHERN STATES POWER COMPANY) Docket Nos. 50-282-LR/ 50-306-LR
)
(Prairie Island Nuclear Generating Plant,)
Units 1 and 2)

NRC STAFF'S RESPONSE TO
MOTIONS FOR PROTECTIVE ORDER FILED BY
NORTHERN STATES POWER COMPANY AND THE PRAIRIE ISLAND INDIAN COMMUNITY

INTRODUCTION

The Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to the March 9, 2009, Northern States Power Company's ("NSPM") Motion for Protective Order and Non-Disclosure Agreement Regarding Proprietary Documents and Prairie Island Indian Community's ("PIIC") Motion for Protective Order and Non-Disclosure Agreement Regarding Proprietary Documents. The Staff opposes these motions to the extent that they require the Staff and its counsel to execute non-disclosure agreements ("NDAs") prior to obtaining access to documents that the parties claim as proprietary.¹ Requiring the Staff and its counsel to sign

¹ For the Board's convenience, the Staff has attached portions of the parties' proposed Protective Orders that the Staff has modified to exempt the Staff from the requirement to sign an NDA. Attachments 1 and 2. The Staff is mindful of the Board's instruction that the parties come to agreement on a joint motion for protective order. The parties have been in communication, but have not been able to come to agreement, notwithstanding what the Staff views as good faith efforts. Should the parties continue to be unable to come to an agreement, the Board has stated that it will issue a protective order. Order (Granting Motion for Extension of Time to File Motions to Compel and Directing Negotiations of Protective Order), dated March 16, 2009, at 2. If the Board does craft an order, it may find it useful to have in hand the Staff's views on the matter.

the proposed NDAs is unnecessary given the protections afforded the parties under the Trade Secrets Act. It is at odds with the regulations governing the treatment of proprietary information at 10 C.F.R. §2.390(b)(6) and could lead to a conflict with the Staff's obligations under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. These considerations are thrown into sharp relief by the fact that the parties state no reason for requiring the Staff to sign NDAs. Moreover, the PIIC's reliance on a protective order issued in another proceeding is misplaced. Finally, the PIIC's Proposed Order would allow only Staff Counsel to have access to protected documents; it would preclude the Staff from access to documents even if the Staff were willing to sign a NDA.

DISCUSSION

The Staff and Staff counsel are subject to potential criminal proceedings under the Trade Secrets Act, 18 U.S.C. § 1905 (2008), for the unauthorized disclosure of proprietary information. The Trade Secrets Act provides:

Whoever, being an officer or employee of the United States or of any department or agency thereof ... publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties ... which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to identify, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; ... shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

Id. Under the Trade Secrets Act, NRC employees are subject to fine, imprisonment, and loss of employment for the unauthorized release of proprietary information. These are significantly more stringent sanctions than those provided in the protective orders proffered by NSPM and PIIC. Those protective orders only allow for Board sanctions in this case and referral of the violation to the appropriate bar association and/or other disciplinary authority. See, NSPM's Protective Order (Governing Non-Disclosure of Certain Documents Claimed to be Proprietary), at ¶ 13 (March 9, 2009) and PIIC's Protective Order (Governing Non-Disclosure of Certain

Documents Claimed to be Proprietary) at ¶ 13 (March 9, 2009). The sanctions provided for in the proposed protective orders pale in comparison to the sanctions Staff employees face under the Trade Secrets Act. Requiring the Staff to sign NDAs in this matter is, thus, unnecessary.

The regulatory scheme that governs the treatment of proprietary information at the NRC does not contemplate that the Staff would have to sign NDAs. That scheme explicitly removes the Staff and the presiding officer in such proceedings from the reach of protective orders. The regulation at 10 C.F.R. § 2.390(b)(6) provides:

Withholding from public inspection does not affect the right, if any, of persons properly and directly concerned to inspect the documents. Either before a decision of the Commission on the matter of whether the information should be made publicly available or after a decision has been made that the information should be withheld from public disclosure, the Commission may require information claimed to be a trade secret or privileged or confidential commercial or financial information to be subject to inspection under a protective agreement by contractor personnel or government officials other than NRC officials, by the presiding officer in a proceeding, and under protective order by the parties to a proceeding.

(emphasis added). The regulation contemplates that the parties to a proceeding may be required to inspect the documents in question under a protective order, but it imposes no such restriction on NRC employees or the presiding officer. The way in which the regulation is structured argues against the imposition of a protective order on the Staff here.

In addition, under the NRC regulations that implement FOIA, 10 C.F.R. Part 9, Subpart A, proprietary information may be disclosed in response to a FOIA request under certain circumstances. 10 C.F.R. § 9.25. Staff counsel's execution of a NDA cannot bind the Commission to document release or withholding determinations where the Commission is subject to federal law and its own regulations.

The motions filed by NSPM and PIIC fail to articulate any basis for their requirement that the Staff sign NDAs. Neither party raises any concern regarding the proper conduct of the Staff. They do not dispute the general presumption that government officials are presumed to be

acting in good faith when carrying out their public duties. *T&M Distributors, Inc. v. US*, 185 F.2d 1279, 1285 (CA Fed. 1999); *Carahsoft Technology Corp. v. US*, No. 08-646C, 2009 WL 416090 (Fed. Cl. 2009). In fact, the Staff already has access to the proprietary documents NSPM has filed in connection with its application for license renewal.

In support of its motion, PIIC relies on a protective order issued in another proceeding, *Shaw Areva MOX Services (Mixed Oxide Fuel Fabrication Facility)*("MOX"), Order (Adopting Protective Order), December 31, 2008 (Agencywide Document Access and Management System Accession No. ML08366130). PIIC asserts that its order is similar to the one issued in the MOX proceeding. But the MOX Protective Order did not require the Staff to sign a non-disclosure agreement prior to obtaining access to proprietary documents; the MOX Protective Order imposed this requirement only on the intervenors in the proceeding. It states: "This Protective Order governs the disclosure to and the use of certain Controlled Information by Blue Ridge Environmental Defense League, (BREDL), Nuclear Watch South (NWS), and Nuclear Information and Resource Service (NIRS) (collectively, Intervenors)". *Id.* at ¶ A. It lists four individuals who will have access to controlled information pursuant to the order, all of whom are associated with intervenors. *Id.* at ¶ D. In addition, the MOX Controlled Information Nondisclosure Declaration at ¶ 1.e defines individuals who are authorized to access the controlled information as NRC employees, consultants and contractors, the applicant's employees, and individuals who have signed the nondisclosure declaration. NRC employees are not required to sign the NDA in order to obtain access to the documents. The MOX Protective Order is, thus, consistent with the Staff's position, that the Staff should not be required to execute a NDA in order to obtain access to proprietary documents.

Finally, the PIIC's proposed non-disclosure agreement would preclude Staff access to documents designated "Highly Confidential – Attorneys' Eyes Only". In other words, even if the Staff were willing to sign the PIIC's NDA, the Staff would be barred from access to these

documents. Because the Staff must make safety and environmental impact determinations for its Safety Evaluation Report and its Supplemental Environmental Impact Statement, this restriction could prevent the Staff from executing its duties and it is, therefore, unacceptable.

CONCLUSION

For the foregoing reasons, the Staff objects to the proposed protective orders submitted by Northern States Power and the Prairie Island Indian Community to the extent that they require the Staff to execute non-disclosure agreements and preclude the Staff's access to protected documents.

Respectfully submitted,

/Signed (electronically) by/

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**/Executed in accord with 10 C.F.R. §
2.304(d)/**

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Dated at Rockville, Maryland
this 19th day of March 2009

**NRC STAFF'S RESPONSE TO MOTIONS FOR PROTECTIVE ORDER
FILED BY NORTHERN STATES POWER COMPANY AND THE PRAIRIE
ISLAND INDIAN COMMUNITY**

Attachment 1

"NRC Staff's Proposed Changes to the PIIC's Proposed Protective Order"

disclosure agreement, NRC Staff and counsel, and the Board and its staff, may have access to Proprietary Documents.⁴ Proprietary Documents shall only be used as necessary for the conduct of this proceeding. Proprietary documents shall not be disclosed in any manner to any person except (a) the Board and its staff, (b) NRC Staff and counsel, and (c) those representatives of NSPM and the PIIC, engaged in the conduct of this proceeding who have executed the non-disclosure agreement and who, in the reasonable opinion of the party who has received the Proprietary Documents, need to know the information contained in the Proprietary Documents in order to carry out their responsibilities in this proceeding. Proprietary Documents designated "Highly Confidential – Attorney's Eyes Only" shall only be used for the purpose of this litigation and may be disclosed only to the Board and its staff, and NRC Staff and Counsel, PIIC Counsel, NSPM's outside legal counsel (including counsel's partners, associates, and employees), and independent experts retained by the other party with a need to know and having no permanent employment or permanent consulting relationship with that other party who have signed the Non-Disclosure Agreement. Individuals with access to

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⁴ Except for the Board and its staff, and the NRC Staff and counsel, each person who is authorized by this Protective Order to inspect or have access to Proprietary Documents, including materials designated as "Highly Confidential – Attorney's Eyes Only" and who does inspect any such material, shall, before conducting such inspection or having such access, be provided with a copy of this Protective Order. Any further use or disclosure of the trade secrets and/or privileged and confidential commercial and financial information contained in the Proprietary Documents by NSPM or the PIIC is subject to the terms of this Protective Order.

Deleted: A party may make documents it identified as Proprietary Documents in its privilege log available to NRC counsel, witnesses, employees, consultants and other representing the NRC Staff for inspection provided that the Staff personnel have signed the non-disclosure agreement. In addition, e

Proprietary Documents may make copies of and take notes on the confidential information contained in the documents, but such copies and notes become Proprietary Documents subject to the terms of this Protective Order.

**NRC STAFF'S RESPONSE TO MOTIONS FOR PROTECTIVE ORDER
FILED BY NORTHERN STATES POWER COMPANY AND THE PRAIRIE
ISLAND INDIAN COMMUNITY**

Attachment 2

"NRC Staff's Proposed Changes to NSPM's Proposed Protective Order"

NRC Staff's Proposed Changes to NSPM's Proposed Protective Order

2. Upon request of NSPM or the PIIC, the party claiming protected status for a Proprietary Document shall provide an unredacted copy of such document to the duly authorized representatives of the requesting party if such representatives have signed the non-disclosure agreement attached hereto. The party claiming protected status for a Proprietary Document shall provide an unredacted copy of such document to the NRC Staff and Staff counsel upon the request of NRC Staff counsel. Each such Proprietary Document produced shall be marked on the first page with a conspicuous "Proprietary" label. The representatives of NSPM and the PIIC receiving such Proprietary Documents shall hold such documents in confidence and in compliance with the terms and conditions of this order.³

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5. Only individual counsel, consultants, witnesses, employees, and other

³ This order, and the good faith representation and designation of documents as Proprietary Documents by counsel for the producing party, serves in lieu of the requirement for marking and for an affidavit under 10 C.F.R. § 2.390(b) and allows the Staff to receive Proprietary Documents and to protect their confidentiality under FOIA. Nothing in this Order shall be interpreted to prevent the NRC from discharging its obligation to determine the release or retention of documents in its possession and control in accordance with federal regulation or statute.

NRC Staff's Proposed Changes to
NSPM's Proposed Protective Order

representatives of the requesting parties who have executed the attached non-disclosure agreement, NRC Staff and Staff counsel, and the Board and its staff, may have access to Proprietary Documents.⁴ Proprietary Documents shall only be used as necessary for the conduct of this proceeding. Proprietary documents shall not be disclosed in any manner to any person except (a) the Board and its staff, (b) NRC Staff and Staff counsel, and (c) those representatives of NSPM and the PIIC engaged in the conduct of this proceeding who have executed the non-disclosure agreement and who, in the reasonable opinion of the party who has received the Proprietary Documents, need to know the information contained in the Proprietary Documents in order to carry out their responsibilities in this proceeding. Individuals with access to Proprietary Documents may make copies of and take notes on the confidential information contained in the documents, but such copies and notes become Proprietary Documents subject to the terms of this Protective Order.

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⁴

Deleted: A party may make documents it identified as Proprietary Document in its privilege log available to NRC counsel, witnesses, employees, consultants and others representing the NRC Staff for inspection in lieu of such NRC representatives signing the non-disclosure agreement. In that event access would not include making copies unless the Staff personnel signed the non-disclosure agreement.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
NUCLEAR MANAGEMENT COMPANY, LLC) Docket Nos. 50-282-LR/ 50-306-LR
)
(Prairie Island Nuclear Generating Plant) ASLBP No. 08-871-01-LR-BDOI
Units 1 and 2)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO MOTIONS FOR PROTECTIVE ORDER FILED BY NORTHERN STATES POWER COMPANY AND THE PRAIRIE ISLAND INDIAN COMMUNITY," dated March 19, 2009, have been served upon the following by the Electronic Information Exchange, this 19th day of March, 2009:

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