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FOIA/PA REQUEST

Case No.:

2010-0023A

Date Rec'd:

8-27-10

Specialist:

Dennis

Related Case:

2010-0254

August 27, 2010

VIA FEDERAL EXPRESS
AND FACSIMILE (without attachments)

Executive Director for Operations
FOIA/Privacy Act Officer
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
FOIA/PA APPEAL

Facsimile: (301) 415-5130

**Re: FOIA/PA APPEAL – Appeal from Response to Freedom of
Information Act Request 2010-0254**

To Whom It May Concern:

On behalf of the Southern Alliance for Clean Energy (“SACE”), we write to appeal the Nuclear Regulatory Commission’s (“NRC’s”) July 29, 2010 response and partial denial of SACE’s Freedom of Information Act (“FOIA”) request 2010-0254.

Background

On June 10, 2010, SACE submitted a FOIA request, via U.S. mail and facsimile, to NRC for information related to certain combined license applications (“COLAs”) expected to be submitted in 2010 and 2011. *See* Attachment A. As part of the FOIA request, SACE requested (the “Request for the Nuclear Innovation Letter”):

1. All documents, records, and correspondence related to a COLA for two new units, anticipated to be filed in late FY 2010, as referenced on page 33 of the Semiannual Status Report on the Licensing Activities and Regulatory Duties of the United States Nuclear Regulatory Commission, October 2009-March 2010.

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2. To the extent different from the information requested in paragraph 1 above, all documents, records, and correspondence related to a COLA for two new units, anticipated to be filed in late FY 2010 by an unspecified applicant, as referenced on page 19 of the Quarterly Report on the Status of New Reactor Licensing Activities, January 1-March 31, 2010.

Attachment A at 1.

On July 29, 2010, NRC sent a response to SACE's request, withholding in its entirety the document responsive to the Request for the Nuclear Innovation Letter. *See* Exhibit B. Although NRC cited Exemption 4 as the reason for the withholding, it failed to justify this determination.

Timeliness

Appeals must be filed within 30 calendar days of NRC's response to a FOIA request. 10 C.F.R. § 9.29. This appeal is timely, having been made within 30 days of NRC's July 29, 2010 response.

NRC's Failure to Justify Its Withholding Violates FOIA

In its July 29, 2010 response, NRC notified SACE that it was withholding content responsive to SACE's Request for the Nuclear Innovation Letter under FOIA Exemption 4, but failed to justify its determination.

As the Supreme Court has recognized, FOIA generally requires that records held by federal agencies be released to the public upon request. *See e.g. John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Indeed, once a responsive record has been identified, it *must* be released unless it is exempt from disclosure under one of FOIA's nine exemptions. *Id.*; *see also Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973) ("In essence the Act provides that all documents are available to be public unless specifically exempted by the Act itself."). These exemptions are to be narrowly construed, with all doubts resolved in favor of disclosure. *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 478 (2nd Cir. 1999) (citing *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1245 (4th Cir. 1994)).

Consistent with the "strong presumption in favor of disclosure," the agency has the burden of proving that the requested information falls under a claimed narrow exemption. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). This burden cannot be sustained by mere "conclusory and generalized allegations of confidentiality." *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir. 1976).

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Despite the strong presumption in favor of disclosure, NRC withheld the entire document response to the Request for the Nuclear Innovation Letter. To meet its substantial burden of justification for withholding the document, NRC simply checked a box on its determination letter, providing that "the information is considered to be confidential business (proprietary) information." Attachment B at 1. No additional explanation was offered for this cursory denial.

NRC's brief justification is insufficient. Instead of explaining its reasons for withholding the document, NRC resorted to using the bare claims of confidentiality that are expressly prohibited. *See e.g. National Parks* 547 F.2d at 680; *Bristol-Meyers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir. 1970).

The Information Withheld Does Not Fall Under Exemption 4

In general, NRC may withhold information under Exemption 4 if it can demonstrate that the information is (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential. 5 U.S.C. § 552(b)(4). Courts have consistently held that the terms "commercial" and "financial" should be attributed their ordinary meaning. *See, e.g., Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). The term "person" has also been clearly defined – meaning simply anyone other than an agency of the federal government. *See, e.g., Judicial Watch v. Export-Import Bank*, 108 F. Supp. 2d 19, 28 (D.D.C. 2000). Under Exemption 4, the definition of "confidential" is more complex. Information is "confidential" if its disclosure is likely to (1) impair the government's future ability to obtain necessary information; or (2) impair other government interests such as compliance, program efficiency and effectiveness, and the fulfillment of an agency's statutory mandate; or (3) cause substantial harm to the competitive position of the person from whom the information was obtained. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 163, 172 (2005) at 163-64 (citing *McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin.*, 180 F.3d 303, 305 (D.C. Cir. 1999), reh'g en banc denied, No. 98-5251 (D.C. Cir. Oct. 6, 1999); *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc), cert. denied, 507 U.S. 984 (1993), approving on this ground but rev'g and vacating on other grounds, 830 F.2d 278, 286 (D.C. Cir. 1987); *9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 7-10 (1st Cir. 1983). NRC has interpreted the third prong of the definition of "confidential" to require a showing of (a) the existence of competition and (b) the likelihood of substantial competitive injury. *PFS*, CLI-05-1, 61 NRC at 164, 171 (citing *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988); *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976)).

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Because NRC failed to provide an informative determination letter, SACE is forced to speculate about whether the document withheld satisfies the three requirements of Exemption 4. In general, the narrow construction of the exemption makes it unlikely that the entire document was properly withheld. See *Vaughn* at 344 (given that the requesting party cannot know the exact content of the information withheld, the best it "can do is argue that the exception is very narrow and plead that the general nature of the documents sought make it unlikely that they will contain" information of the type exempt from disclosure).

The Information Withheld was Not Privileged or Confidential

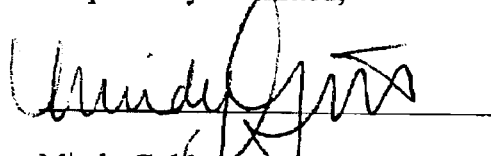
There is no reason to believe that the entire Nuclear Innovation Letter was privileged or confidential. The letter simply reflected the future intent of a power company to submit a COLA. Such information, on its face, does not seem to be the type that could cause substantial harm to the competitive position of Nuclear Innovation. Indeed, in response to the SACE FOIA request, the NRC released a similar letter, in its entirety, submitted by American Electric Power.

Conclusion

NRC has failed to provide SACE with a justification sufficient to support the withholding of information under Exemption 4. Moreover, based on the general nature of American Electric Power's letter, it appears that the withheld Nuclear Innovation letter would fall outside the scope of the exemption.

Unless NRC provides additional information sufficient to justify its withholding of content responsive to SACE's June 10, 2010 FOIA request under Exemption 4, those records should be released within 20 working days.

Respectfully submitted,



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FAX COVER SHEET

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NUMBER OF PAGES,
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MESSAGE:

FOIA/PA Appeal - Appeal from Response to Freedom of Information Act Request 2010-0254

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