

November 23, 2010 (3:39p.m.)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

**Michael C. Farrar, Chair
Dr. Nicholas G. Trikouros
Lawrence G. McDade**

In the Matter of)	November 23, 2010
Shaw AREVA MOX Services, LLC)	Docket No. 70-3098-MLA
(Mixed Oxide Fuel Fabrication Facility)	
Possession and Use License))	ASLB No. 07-856-02-MLA-BD01

**JOINT MOTION FOR ISSUANCE OF AN ORDER
ESTABLISHING PROCEDURES FOR PUBLIC DISCLOSURE OF INFORMATION
AND REDACTION OF SUNSI DOCUMENTS**

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.323, 2.319(g), and 2.390(f), Nuclear Watch South, Blue Ridge Environmental Defense League, and Nuclear Information and Resource Service (collectively "Intervenors"), Shaw AREVA MOX Services, LLC ("MOX Services"), and the U.S. Nuclear Regulatory Commission Staff ("NRC Staff") (collectively "Parties") hereby request the Atomic Safety and Licensing Board ("ASLB") to issue an order governing public disclosure of information and redaction of documents containing sensitive unclassified non-safeguards information ("SUNSI") in this proceeding.¹ This Joint Motion addresses only SUNSI and does

¹ SUNSI is defined in the current interim NRC policy on SUNSI, COMSECY-05-0054, Attachment 2, NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information at 1 (Oct. 26, 2005), and the superseded NRC policy on SUNSI, SECY-04-1091, Memorandum from Luis A. Reyes to the Commissioners re: Withholding Sensitive Unclassified Information Concerning Nuclear Power Reactors from Public Disclosure at 6 (October 19, 2004). SUNSI includes Material Control &

not address or affect information that is subject to withholding from public disclosure on other grounds.

Consistent with the ASLB's written order of September 16, 2010, and its verbal request of October 26, 2010, this motion reflects the Parties' agreement on a process by which SUNSI can be protected and non-SUNSI that is not otherwise protected from disclosure can be released to the public. The Parties agree to the set of principles and procedures set forth below.

II. DISCUSSION

The Parties recognize that although certain information must be protected from disclosure, maximizing public disclosure of information related to the regulatory and licensing process is an important and longstanding NRC policy. *See* NRC's Open Government Plan, Revision 1.1 at 6 (June 7, 2010). "Since its creation in 1975, the NRC has viewed openness as a critical element for achieving the agency's mission to regulate the Nation's civilian use of radioactive materials and thereby protect people and the environment." *Id.* at 1. The NRC has identified broad access to public hearings as a "key information dissemination channel." *Id.* at 7.

The Parties also acknowledge that the NRC should "appropriately balance [its] desire to maintain the openness of NRC's regulatory processes with the need to protect the public from possible terrorist threats." SECY-04-0191, Withholding Sensitive Unclassified Information Concerning Nuclear Power Reactors From Public Disclosure at 1 (Oct. 19, 2004). The NRC protects SUNSI from public disclosure because such disclosure could "reasonably be foreseen to harm the public interest, the commercial or financial interests of the entity or individual to whom

Accounting ("MC&A") information that is designated as commercial or financial information (*i.e.*, proprietary information) pursuant to 10 C.F.R. § 2.390(d)(1).

the information pertains, the conduct of NRC and Federal programs, or the personal privacy of individuals.”²

In order to ensure an appropriate balance between the NRC’s policies of maximizing public disclosure of information and protecting SUNSI from public disclosure in this case, the Parties request the ASLB to take or require the following measures:

A. The Parties request the ASLB to “limit its use of protected information so that its issuances, to the greatest extent possible, can be placed in the public record of the proceeding.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-06, 51 NRC 101, 135 (2000). The ASLB should also require the Parties to endeavor to do the same, although the NRC Staff may be in a better position than Intervenors and MOX Services to distinguish between SUNSI and non-SUNSI. The Staff’s response to Intervenors’ Contentions 9, 10, and 11, which publicly summarizes the contentions without providing the details that might render the response SUNSI or proprietary, is an example of the NRC Staff’s implementation of this policy. *See* NRC Staff Response to Petitioners’ Motion for Admission of Contentions 9, 10, and 11, Etc. at 12-13 (August 23, 2010).

B. The Parties request the ASLB to provide that for any order or decision that it issues under the Protective Order, it will issue simultaneous public notice that the order or decision has been issued and a brief summary of the subject matter, containing only public, non-SUNSI, non-proprietary information that is not otherwise protected from disclosure.

² COMSECY-05-0054, Attachment 2, NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information at 1 (Oct. 26, 2005). *See also* NRC Management Directive 12.6, NRC Sensitive Unclassified Information Security Program (Dec. 20, 1999); NRC Regulatory Issue Summary 2005-31, Control of Security-Related Sensitive Unclassified Non-Safeguards Information Handled by Individuals, Firms, and Entities Subject to NRC Regulation of the Use of Source, Byproduct, and Special Nuclear Material (Dec. 22, 2005).

C. Similarly, the Parties request the ASLB to require that for any pleading or piece of correspondence that is submitted to the ASLB in accordance with the Protective Order, the party shall simultaneously provide public notice of the pleading in the form of a public cover letter and certificate of service, which should be sent to the Secretary's office by e-mail and first-class mail, as the parties have done thus far in this proceeding. *See also Private Fuel Storage*, 51 NRC at 135.

D. As recognized in *Private Fuel Storage*, it is generally impractical to require extensive redactions of pleadings and decisions immediately upon their submittal. *See* 51 NRC at 135. In that case, the ASLB stated that the Board and the parties should wait until the end of the merits proceeding to resolve any disputes over the protected nature of information. *Id*; *see also Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1)*, ALAB-696, 16 NRC 1245, 1261 (1982). Given (a) the public interest in receiving timely information regarding the subject matter of licensing hearings, and (b) the importance of adjudicatory decisions in the licensing process, the Parties request the ASLB to endeavor to issue redacted versions of substantive decisions involving SUNSI or proprietary information that is not otherwise protected from disclosure, as soon as possible after those decisions are made. Such decisions would include, for instance, rulings on the admissibility of contentions, motions to dismiss, and summary disposition motions, and merits decisions.

E. With respect to redaction of pleadings submitted by the Parties, however, the Parties do not seek an order requiring immediate redaction of documents. Pursuant to 10 C.F.R. § 2.390(b)(6), Intervenors would wait until the conclusion of any merits proceeding or the dismissal of the contentions to seek redactions or public disclosure of pleadings. Intervenors

reserve their right to request that the Board resolve any dispute over the redaction or disclosure of pleadings at that time.³

In the meantime, Intervenor would use the NRC's Freedom of Information Act ("FOIA") procedures to request redacted versions of licensing correspondence and pleadings, including materials related to the Fundamental Nuclear Material Control Plan ("FNMCP"). If Intervenor are not satisfied with the FOIA process, they may appeal those determinations in accordance with 10 C.F.R. § 9.29.

F. In order to ensure that the ASLB has adequate resources to discharge the elements of its order, the Parties request the Board to designate a representative to assist with the categorization of information as SUNSI, as has been done in other licensing proceedings. *See* Transcript, *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 and 4) at 557 (Nov. 13, 2009) (ML0932301180); Transcript, *Luminant Generation Company, LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4) at 479-482 (Nov. 12, 2009) (ML0932202160); Order (Regarding November 13, 2009, Oral Argument), *South Texas Project*

³ The Commission recently raised the issue of the authority of licensing boards to direct the Staff to redact SUNSI documents. *See South Texas Project Nuclear Operating Company* (South Texas Project, Units 3 and 4), CLI-10-24, 72 NRC ___, slip op. at 13, n.53 (Sept. 29, 2010) ("we need not reach the question of the Board's authority to direct the Staff to redact the document"); *id.* slip op. at 25, n.99 ("The Board raised several questions concerning the Staff's apparent practice of withholding in their entirety documents containing SUNSI, as well as the potential impact of this practice on our adjudicatory proceedings. The Board's concerns are not without force; we intend to look further into these questions outside of the adjudicatory process.").

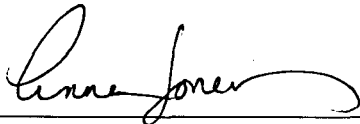
The *South Texas* decision does not appear to affect the ASLB's authority under 10 C.F.R. § 2.390(b)(6) to redact pleadings submitted in a licensing proceeding. *See* Point Beach, ALAB-696, 16 NRC at 1261 (interpreting 10 C.F.R. § 2.790(b)(6) (the predecessor to 10 C.F.R. § 2.390(b)) as allowing it to resolve disputes over designation of proprietary information at the conclusion of a merits proceeding.)

Nuclear Operating Co. (South Texas Project Units 3 and 4) (Nov. 10, 2009) (ML0931402740)
(requiring the Staff to bring to the hearing an expert in categorization of sensitive information).

III. CONCLUSION

For the foregoing reasons, the Parties request the ASLB to establish the elements of this motion in an order.

Respectfully submitted,



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**Michael C. Farrar, Chairman
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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2010, copies of the Joint Motion for Issuance of An Order Establishing Procedures for Public Disclosure of Information and Redaction of SUNSI Documents were served upon the persons listed below, by email and first class mail.

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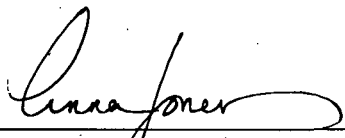
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