

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
PACIFIC GAS & ELECTRIC COMPANY) Docket Nos. 50-275-LR
) 50-323-LR
(Diablo Canyon Nuclear Power Plant,)
Units 1 and 2))

NRC STAFF'S RESPONSE TO BOARD'S PLANNED PROTECTIVE ORDER

INTRODUCTION

As set forth below, the Staff agrees in part, and disagrees in part, with the Board's planned Protective Order ("Order"). The Staff disagrees that the Order should require the Staff and its counsel to execute non-disclosure agreements ("NDAs") prior to obtaining access to various documents that the parties claim contain "Protected Information." Requiring the Staff and Staff counsel to sign the proposed NDAs is unnecessary given the already existing protections afforded the parties under the Trade Secrets Act, 18 U.S.C. § 1905 (2008) and the Economic Espionage Act of 1996. Moreover, the Protective Order appears to be at odds with the regulations governing the treatment of proprietary information at 10 C.F.R. §2.390(b)(6).

In addition, the Staff has a number of other concerns that are listed below.

BACKGROUND

On September 15, 2010, the Board issued an initial scheduling order. Initial Scheduling Order (Sept. 15, 2010) (unpublished) (ADAMS Accession No. ML102580745) ("ISO"). The ISO noted that the law requires that each party to this proceeding disclose all documents relevant to the admitted contentions, except those documents for which a claim of privilege or protected status is made. ISO at 4-6. (Citing 10 C.F.R. § 2.336). In addition, the ISO directed the parties to confer with one another for the purpose of discussing and developing a joint proposed protective order and non-disclosure agreement for the "handling (and redaction) of documents

that are listed on the privilege logs.” ISO at 8. Pursuant to the ISO, the parties jointly and mutually submitted a proposed protective order and nondisclosure agreement on November 9, 2010. Joint Motion for Protective Order (Nov. 9, 2010) (ADAMS Accession No. ML103130616) (“Proposed PO”).

DISCUSSION

I. Objection to Staff Execution of NDAs

The Staff and Staff counsel are subject to potential criminal proceedings under the Trade Secrets Act 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.

Under the Trade Secrets Act, NRC employees are subject to fine, imprisonment, and loss of employment for the unauthorized release of proprietary information. Under the Economic Espionage Act, theft or misappropriation of a trade secret is a federal crime. Penalties for violation of section 1832 are imprisonment for up to 10 years for individuals. These are significantly more stringent sanctions than those provided in the protective orders proffered by the Board. Whereby the Board “will impose such sanctions as the Board may deem appropriate, including but not limited to (1) referral of the violation to appropriate bar associations or other disciplinary authorities, (2) ordering the return of all Protected Documents, or (3) dismissing or narrowing any admitted contention related to the Protected Information or Protected Documents.” Order Section X, at 14. The sanctions provided for in the Planned

Order pale in comparison to the sanctions Staff employees face under the Trade Secrets Act and the Economic Espionage Act of 1996. Requiring the Staff and Staff Counsel to sign NDAs in this matter is, thus, unnecessary.¹

In addition, the regulatory scheme that governs the treatment of protected 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 with a requirement to sign an NDA on the Staff here.

The Board's Planned Protective Order does not articulate any basis for its requirement that the Staff sign NDAs. The Board has not identified any concern regarding the proper conduct of the Staff. Generally, 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).

¹ Understandably, the Board is without authority to impose the sanctions and penalties listed under these Acts, but under applicable rules of professional conduct, any attorney can convey misconduct information to the bar association.

In fact, even without having to sign an NDA, the Staff already has access to the Protected Documents PG&E has filed in connection with its application for license renewal.

More striking is that the Jointly Filed Proposed PO entered into by PG&E, SLOMPF and the Staff did not require the Staff to sign an NDA. All agreed that an NDA would be executed by the parties and their reviewing representative if they seek access to confidential information. Proposed PO at 1. However, the term “party” is defined as not including the NRC Staff. Id. at 2. None of the parties believe that the Staff should be required to execute an NDA.

Finally, if the Staff is legally required to sign the NDAs, then logically the Board, and all other ASLB staff that will have access to the Protected Information, would be required to sign the NDAs. As federal employees, both the Board and its staff are subject to the same restrictions on releasing proprietary information, and the same penalties for violating those restrictions, as the NRC Staff. Moreover, the Board and its staff will have access to the same Protected Documents as the NRC Staff and parties. Consequently, because the Board and its staff will be in an identical position to the NRC Staff, if the Board finds that the NRC Staff should sign the NDAs, then the Board and its Staff may also be required to sign the NDAs.

Based on the foregoing, the Staff objects to the portion of the Order that would require the Staff to sign the NDAs because there is no need to sign them in light of the Trade Secrets Act and signing them is not contemplated by the regulations. Moreover, the parties with an actual interest in protecting their documents have agreed to exclude the Staff from signing NDAs. The Order’s two other listed sanctions are clearly focused on non-governmental parties. Consequently, the Staff asks the Board to eliminate that portion of the Order.

II. Other Staff Concerns With the Planned Protective Order

In addition, the Staff has several other concerns with the Order.

For example, footnote 10 on page 6 states that if national security data or restricted information should arise in this case, the parties should notify the Board in order to develop

appropriate procedures. However, footnote 9 does not contain a similar statement requiring Board notification for Safeguards Information. The Staff believes that the Order should contain a notification provision for Safeguards Information similar to the notification provision for national security data or restricted information.

Paragraph E on page 10 requires the parties to automatically provide copies of all Protected Documents to the other parties. But, other orders, like the one issued by the Board in the license renewal proceeding for the Prairie Island Nuclear Generating Plant, (PINGP Order) (ML0908305250), only require the parties to provide these documents if requested. See PINGP Order at page 3 paragraph 2. The Staff believes that the procedure implemented by the Prairie Island Board is a better approach to document management because it will reduce the number of Protected Documents outside their originator's custody and only result in exchanges of documents when necessary.

Last, paragraph V. on page 14 states that a party may retain copies of Protected Documents after litigation ceases. But later, the paragraph only discusses procedures for retaining filings, transcripts, exhibits, or notes containing Protected Information. This implies that the inclusion of Protected Documents in the list of things that parties may retain was in error. In contrast, the PINGP Order provided that the parties must either destroy or return all Protected Documents at the end of litigation. PINGP Order at 7 paragraph 11.

CONCLUSION

For the reasons set forth above, the Staff respectfully supports and in part disagrees with the Board's proposed Protective Order.

/Signed (electronically) by/

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO BOARD'S PLANNED PROTECTIVE ORDER," dated February 14, 2011, have been served upon the following by the Electronic Information Exchange, this 14th day of February, 2011:

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