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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
SEQUOYAH FUELS CORPORATION GENERAL ATOMICS	)	Docket No. 40-8027-EA
(Gore, Oklahoma Site Decontamination and Decommissioning Funding)	)	Source Material License No. SUB-1010

NUCLEAR REGULATORY COMMISSION STAFF'S REPLY TO GENERAL ATOMICS' BRIEF IN SUPPORT OF MOTION FOR A PROTECTIVE ORDER

INTRODUCTION

Pursuant to the December 7, 1994 Order of Atomic Safety and Licensing Board (Board),[1] as supplemented by the Board's Memorandum of December 27, 1994 (Memorandum),[2] the Nuclear Regulatory Commission staff (Staff) hereby responds to General Atomics' Brief in Support of the Motion for a Protective Order (December 22, 1994), and to the Board's Memorandum.

BACKGROUND

On December 2, 1994, Sequoyah Fuels Corporation (SFC) filed a motion for protective order, requesting that the Board enter a protective order governing the

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[1] Order (Requesting Party Filings on Motion for Protective Order) (December 7, 1994).

[2] Memorandum (Requesting Party Comments) (December 27, 1994).

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disclosure and use of certain discovery material in this proceeding. The Staff opposed the motion for a protective order only as to paragraph 7 of SFC's proposed order, which would have required the Staff to obtain the consent of the party supplying the material covered by the order or the approval of the Board before being permitted to refer any matter disclosed in the protected material to the Office of Investigations (OI), the Inspector General (OIG) or the Executive Director for Operations (EDO).[3]

On December 27, 1994, the Board issued its Memorandum inviting the parties to address the issue of whether the Staff "need be the subject of any protective order" if the Board were to accept the Staff's position that the EDO and the OI, and their staffs are subject to non-disclosure regulations and could be subject to statutory penalties for unauthorized disclosure of protected material.

DISCUSSION

A. General Atomics' Brief in Support of the Motion for Protective Order

In its Brief, General Atomics cites one instance where a Licensing Board entered a protective order that contained provisions more restrictive than those in the paragraph 7 proposed now by the Staff concerning the use of discovery materials by NRC personnel. *See Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Nos. 50-275-OLA-2, 50-323-OLA-2 (Aug. 3, 1993) (1993 WL 315519). Actions taken by another Licensing Board in another proceeding, particularly involving different parties and factual circumstances, are, of course, neither binding on this Licensing Board nor the parties here. Certainly, the principles of *res judicata* or

[3] Nuclear Regulatory Commission Staff's Response to Sequoyah Fuels Corporation's Motion for Protective Order (December 23, 1994).

collateral estoppel do not apply here. *Cf. Alabama Power Co.* (Joseph M. Farley Nuclear Plant Units 1 and 2), ALAB-182, 7 AEC 210 (1974), *remanded on other grounds*, CLI-74-12, 7 AEC 203 (1974) (Collateral estoppel may be applied in an operating license proceeding to bar relitigation of an issue raised in the construction permit proceeding involving the same reactor). Even if the facts and circumstances were similar in *Diablo Canyon* to those here, this Licensing Board is not bound to follow the decisions of the Licensing Board there. *See Cleveland Electric Illuminating Co., et al.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 91 n.7 (1993). Moreover, in *Diablo Canyon,* the parties stipulated to the terms of a protective order and the Licensing Board merely approved it; there was no legal issue in dispute that was briefed, argued, and decided.[4] Accordingly, *Diablo Canyon* is not of any precedential value. *See Public Service Co. of New Hampshire, et al.* (Seabrook Station, Units 1 and 2), ALAB-924, 30 NRC 331, 359 (1989) (Licensing Board was not obligated by *stare decisis* principles to give dispositive effect to even a prior Appeal Board decision where there was no issue of law that was heard and decided).[5]

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[4] In fact, the Staff had no incentive to expand the terms of the protective order in that case because previously the Staff had been provided access to the sole document involved, and undoubtedly determined that there was no reason to pursue any issue concerning constraints upon internal referral of the document.

[5] It is also worth noting that orders of Appeal Boards not published in the official NRC Reports are usually not to be given precedential effect in other proceedings. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-592, 11 NRC 744, 745 (1980). The Staff is unaware of any official publication of the protective order in *Diablo Canyon*, which, of course, was issued not by an Appeal Board, but by a Licensing Board. *A fortiori*, such order should have no precedential value.

General Atomics also argues that the law developed under the Federal Rules of Civil Procedure "is generally applicable to discovery in this proceeding," citing *Public Service Co. of New Hampshire, et al.* (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490 (1983). It claims that courts applying the protective order provisions of Rule 26 of the Federal Rules of Civil Procedure have "routinely" restricted the disclosure of protected materials to those directly involved in the case and limited the use of the protected materials for purposes directly related to the case. General Atomics' Brief at 2. The Staff does not dispute that judicial interpretations of the Federal Rules of Civil Procedure "can serve as guidance." *Seabrook,* LBP-83-17, 17 NRC at 495. Guidance, however, is not the same as binding precedent. Further, even an authority cited by General Atomics, 8 Wright, Miller, and Marcus, *Federal Practice and Procedure* § 2043, states that although the "most common kind of [protective] order allowing discovery on conditions is an order limiting the persons who are to have access to the information disclosed and the use to which these persons may put the information[,] [t]his is not the only possibility, however." *Id.* at 305-06. Thus, it is apparent that even looking to the federal courts for guidance, there is no set form that all protective orders follow.

General Atomics is entitled to some degree of protection from the disclosure of confidential information to the public. In this regard, although the paragraph 7 proposed by the Staff would allow the use of the materials by NRC personnel on a less restrictive basis than that proposed by SFC and General Atomics, the legitimate concern to avoid dissemination to the public is adequately addressed by the Staff's proposal, as General

Atomics recognizes: the Staff's version would only allow, as a general matter,[6] use of confidential materials by persons "*within the NRC.*" General Atomics' Brief at 1 (emphasis added).

Accordingly, for the reasons set forth in the Staff's Response to Sequoyah Fuels Corporation's Motion for Protective Order, and in consideration of the foregoing, the Staff requests that the Licensing Board adopt the proposed protective order with the Staff's proposed paragraph 7.

B. The Licensing Board's Memorandum

In its Memorandum, the Board invited the parties to address the issue of whether it is necessary to subject the Staff to a protective order if the Board accepts the Staff's position that the EDO and OI, and their staffs, are subject to non-disclosure regulations and could be subject to statutory penalties for unauthorized disclosure of protected material.

In the instant case, the Staff has made discovery demands on both SFC and General Atomics.[7] Much of the information and many of the documents requested concern the financial status and corporate structure of both companies individually and their relationship to each other. The requests could require production of numerous

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[6] The Staff's proposed paragraph 7 reasonably allows the NRC Executive Director for Operations, the NRC Director of the Office of Investigations, and the NRC Inspector General, or their staff, to refer protected materials as is appropriate in the legitimate exercise of their respective duties.

[7] NRC Staff's First Request for Production of Documents and First Set of Interrogatories to Sequoyah Fuels Corporation (May 27, 1994); NRC Staff's First Request for Production of Documents and First Set of Interrogatories to General Atomics (May 27, 1994).

documents by SFC and/or General Atomics, some of which maybe protectable. The information is relevant to the Staff's case-in-chief.

A federal employee is subject to fine or imprisonment, or both, and removal from office, pursuant to 18 U.S.C. § 1905, if he:

> 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 the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof . . . to be seen or examined by any person except as provided by law . . . .

See also 5 C.F.R. §§ 2635.101(c) and 2635.902(aa). The statute presupposes that there has been a determination by the agency that the information in question should not be disclosed. *See e.g., United States v. Wallington*, 889 F. 2d 573, 577 (5th Cir. 1989) (citation omitted) (Disclosure is prohibited under the statute "only if the information is confidential, *at least* in the sense that it is the official policy of the agency in question (or is otherwise required by statute or regulation) that the information *not* be released.")

Public availability of NRC documents, including documents submitted to the NRC, is controlled by 10 C.F.R. §§ 2.790, 9.17 and 9.25. Commission policy favors disclosure. *See* 10 C.F.R. § 2.790(a). Section 2.790 provides for 9 exceptions to the general rule of disclosure, including: "Trade secrets and commercial or financial information obtained from a person and privileged or confidential . . . ." 10 C.F.R. § 2.790(a)(4) (exemption 4). The burden is on the person who wishes to withhold disclosure of information under exemption 4 to submit an affidavit delineating, with

specificity, the reasons why the document should be withheld. 10 C.F.R. § 2.790 (b)(1). The Commission will then make a determination, considering the factors in § 2.790(b)(4), whether the information constitutes exemption 4 material and whether it should be withheld. 10 C.F.R. § 2.790(b)(3). A decision to withhold from disclosure will not preclude the Commission from granting access to the presiding officer in a proceeding and, under a protective order, to parties to a proceeding. 10 C.F.R. § 2.790(b)(6). *See also* 10 C.F.R. §§ 2.740(c) and 2.744. If the Commission denies a request for withholding, then the person requesting the withholding will be given the opportunity to withdraw the document. 10 C.F.R. § 2.790(c).[8] Thus, once the agency determines that the material fits under exemption 4, it will not be disclosed.

Based upon the foregoing, it is clear that, as a general proposition, a protective order directed against the Staff is not necessary due to the operation of the regulation (10 C.F.R. § 2.790) and the statute (18 U.S.C. § 1905). But in this case, where the Staff is seeking numerous documents from SFC and General Atomics relevant to the Staff's case, although the Staff could require that the parties seeking protection from disclosure follow the procedures of 10 C.F.R. § 2.790 (b)(1) for each document, the Staff has agreed, for the purposes of this litigation only, to forego that requirement and

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[8] The regulations governing public disclosure under the Freedom of Information Act (FOIA) are found at 10 C.F.R. §§ 9.11, *et seq.* Section 9.17 contains an exemption from disclosure for trade secrets, etcetera, which is identical to the exception found in § 2.790(a)(4). 10 C.F.R. § 9.17(a)(4). Section 9.25 delineates the procedure for determining whether material is exempt from disclosure under § 9.17. In the case of material covered by § 9.17(a)(4), the submitter of the material must be notified of possible disclosure under FOIA and be given an opportunity object to disclosure and state all grounds for non-disclosure, before disclosure will be made. Executive Order 12600, 52 Fed. Reg. 23781 (1987).

to *voluntarily* be subject to a protective order in order to facilitate the discovery process, to conserve time and resources and to streamline the process. Of course, the EDO and OI and their staffs would also be bound by the protective order.

If the parties were required to follow the procedures of 10 C.F.R. § 2.790(b)(1) for each document which they believe should be protected, creating an affidavit for each document or perhaps for each group of documents, document discovery would be inordinately delayed. It would, as a consequence, delay the remainder of the case. If a protective order is entered in this matter, such delay would be unnecessary as the Staff would voluntarily agree that certain materials would be protected, for the purposes of this litigation only, without requiring a § 2.790 determination.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Staff's Response to Sequoyah Fuels Corporation's Motion for Protective Order, the Staff requests that the

Licensing Board adopt the proposed protective order with the Staff's proposed paragraph 7.

Respectfully submitted,

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Counsel for NRC Staff

Dated at Rockville, Maryland
this 6th day of January 1995

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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SEQUOYAH FUELS CORPORATION	)	Docket No. 40-08027-EA
GENERAL ATOMICS	)	
	)	Source Material License
(Gore, Oklahoma Site Decontamination	)	No. SUB-1010
and Decommissioning Funding)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NUCLEAR REGULATORY COMMISSION STAFF'S REPLY TO GENERAL ATOMIC'S BRIEF IN SUPPORT OF MOTION FOR A PROTECTIVE ORDER" in the above-captioned matter have been served on the following by deposit in the United States mail, first class, or as indicated by asterisk through deposit in the Nuclear Regulatory Commission's internal mail system or as indicated by a double asterisk by facsimile or as indicated by a triple asterisk by electronic mail this 6th day of January 1995.

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