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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

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Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. James H. Carpenter
L. Peter A. Morris

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In the Matter of

ALABAMA POWER COMPANY

(Joseph M. Farley Nuclear
Plant, Units 1 and 2)

Docket No. 50-348-CivP
50-364-CivP

ASLBP No. 91-626-02-CivP

May 1, 1992

MEMORANDUM AND ORDER

(Conditionally Granting APCo Motion
to Continue Proprietary Treatment
of Certain Exhibits)

On April 16, 1992, licensee Alabama Power Company (APCo) filed a motion, supported by the NRC staff, requesting that the Board continue to treat all or portions of APCo Exhibits 16, 17, and 20, and Staff Exhibit 32 specified in Attachment A to the motion as confidential business/proprietary information. Previously, these exhibits were admitted into evidence in this proceeding without restrictions on their public availability.¹ As we explain herein, we grant APCo's request on an interim basis, subject to a final determination after the parties have provided the Board with additional information relative to their nondisclosure claims.

¹ See Tr. 529, 947.

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I.

No mention of the proprietary nature of these documents was made by the parties at the time they were admitted into evidence. The question of the proprietary status of APCo Exhibits 16 and 17 arose during review of the exhibits by NRC document control personnel prior to placing the exhibits in the agency's public document system. As a consequence, counsel for the parties were contacted in an effort to ascertain the status of the documents.

Thereafter, counsel discussed the status of the documents with the Board Chairman during an April 10, 1992 telephone conference. At that time, the parties were advised that the Board would entertain a motion to have the purportedly proprietary portions of the exhibits sealed.

In APCo's April 16 motion, we are advised for the first time that, as a result of an additional review of the record of this proceeding, the parties also have identified portions of APCo Exhibit 20 and all of Staff Exhibit 32 as warranting confidential treatment as proprietary.² APCo further represents that the parties wish to retain the

² The parties note that three other exhibits, APCo Exhibits 64 and 48 and Staff Exhibit 31 also have proprietary markings but, upon further examination, do not warrant confidential treatment. [APCo] Motion to Continue Proprietary Treatment of Certain Exhibits (Apr. 16, 1992) at 3 n.1. In addition, the parties represent that they have identified no portions of the hearing transcript or other portions of the record that contain proprietary information. Id. at 3.

proprietary portions of these documents, as well as the proprietary portions of APCo Exhibits 16 and 17, as part of the record of this proceeding.

Also as to APCo Exhibits 16 and 17 -- the 1983 Franklin Research Center environmental qualification technical evaluation reports (TERs) for Farley Units 1 and 2, respectively -- APCo declares that it has not contacted all the vendors affected by the proprietary pages of the TERs to determine whether they would voluntarily withdraw their prior requests for nondisclosure. APCo states that it did contact representatives of Westinghouse Electric Company (Westinghouse) regarding the TER pages involving hydrogen recombiners, which APCo suggests is the equipment predominantly affected by this disclosure issue, and that Westinghouse will not consent to relinquishing the proprietary status of its information. APCo further asserts that, in this light, it is appropriate to treat all the designated pages of its Exhibits 16 and 17 alike by affording them proprietary treatment.

Finally, APCo states that counsel for both parties have reviewed the proprietary information in question, which APCo describes as generally comprising performance characteristics of the equipment involved and the environmental qualifications for that equipment. Acknowledging that "counsel are not privy to the reasoning

of the equipment vendors involved, and may not fully appreciate the vendors' basis for treatment of the information as proprietary," APCo notes that the information has been accorded longstanding proprietary status and represents that it "does appear to be of a type that in good faith can be treated as proprietary."³ Observing that the agency has previously determined that the information in question is proprietary, APCo concludes that its motion should be granted because no new finding is required by the Board concerning the confidential nature of the information.

II.

As far as we are able to ascertain from the material before us, any previous determination that the exhibits in question should be afforded proprietary treatment was made by the NRC staff, acting under delegated authority. Nonetheless, and contrary to APCo's assertion, a prior determination by the NRC staff (as opposed to the Commission) that a particular document will be accorded proprietary treatment is not necessarily binding upon a Licensing Board as it considers what status to accord the document as part of the adjudicatory record in a 10 C.F.R. Part 2, Subpart G hearing.⁴ Under the Commission's

³ Id. at 5.

⁴ See 10 C.F.R. § 2.790. See also id. §§ 2.740(c)(6), 2.744.

professed policy that, absent "a compelling reason for nondisclosure" records and documents in such proceedings "shall not . . . be exempt from disclosure,"⁵ it becomes the Board's responsibility to take the necessary steps to ensure that these exhibits, as part of the record of a public adjudicatory proceeding, are afforded appropriate treatment.⁶ This is particularly so in this instance, when by all appearances substantial periods of time have passed since determinations were made about the proprietary status of the documents.⁷

After reviewing the documents in question, we have no quarrel with the parties' assertion that the information

⁵ Id. § 2.790(a),

⁶ See generally Kansas Gas and Electric Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-327, 3 NRC 408, 417 (1976).

⁷ See NRC Manual Chapter 0211, Part III.E.3.a.(2) (for Freedom of Information Act review of records marked as containing proprietary information, if significant time has passed since nondisclosure affidavit was submitted, company providing information should be requested to advise NRC if the information is still proprietary) (to be recodified as NRC Management Directive 3.1).

APCo Exhibits 16 and 17 are a little over nine years old, APCo Exhibit 20 is somewhat over eight years old, and Staff Exhibit 32 was issued more than twenty years ago. APCo Exhibit 48 seems to reflect that an agency determination about the proprietary status of Staff Exhibit 32 was made almost fifteen years ago. Although we cannot ascertain exactly when any confidentiality determinations were made relative to APCo Exhibits 16, 17, and 20, we think it reasonable to assume such decisions were made relatively contemporaneously with the issuance dates of the documents.

sought to be protected "does appear to be of the type that in good faith can be treated as proprietary." Yet, with the possible exception of APCo Exhibit 20,⁸ we likewise are not "privy" to any information that sheds a definitive light on the reasoning of the equipment vendors who sought proprietary treatment for these documents.⁹ Moreover, with the exception of the limited portions of APCo Exhibits 16 and 17 dealing with hydrogen recombiners, we have no confirmation that, despite the passage of substantial periods of time, the companies that submitted the documents still consider the information they contain to be proprietary so as to warrant confidential treatment.

Before we can make a final determination relative to nondisclosure of the exhibits in question, we require more information. Nonetheless, based upon our facial review of the exhibits, we conclude that the documents warrant interim protection while we attempt to ascertain the current reasoning supporting nondisclosure.¹⁰ Accordingly, the

⁸ Attachment 3 to the 1984 letter admitted as APCo Exhibit 20 (Bates Nos. 57665-73) is a 1980 affidavit from Westinghouse requesting confidential treatment of the portions of the document APCo now asserts should be sealed as proprietary.

⁹ Compare 10 C.F.R. § 2.790(b)(1) (person seeking nondisclosure shall submit application with affidavit identifying document and reasons for nondisclosure).

¹⁰ See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1214-15 (1985).

motion to continue proprietary treatment of the exhibits in question is granted, subject to our final consideration of the matter once we have received the additional information we outline below.

To permit the Board to make a final determination relative to the confidential status of the documents, on or before July 1, 1992, the parties should provide the Board with the following information relative to the portion of each of their exhibits for which they seek proprietary treatment:

1. A copy of any affidavit previously supplied to the agency in support of a request for treatment of the information as confidential business (proprietary) information.
2. A copy of any agency determination relative to that affidavit.
3. A written justification from an appropriate official of the company that provided the information, as specified in 10 C.F.R. § 2.790(b)(1)(ii), that explains why the information is still proprietary, taking into account the factors set forth in 10 C.F.R. § 2.790(b)(4).

Once we have received this information, along with any additional explanation the parties may wish to supply in support of their request for confidential treatment of the exhibits in question, the Board will issue a final ruling on the status of the documents.

To protect the purportedly proprietary information during our ongoing review, the unexpunged versions of APCo Exhibits 16, 17, and 20, and Staff Exhibit 32 previously


admitted into evidence will be placed under seal. Redacted copies of those documents will be placed in the public docket of this proceeding. We note that APCo already has supplied the Docketing and Service Branch of the Office of the Secretary with three copies of each of its exhibits with the proprietary pages deleted. So that the public record concerning these documents will be clear, on or before May 8, 1992, APCo should supply the Docketing and Service Branch with three copies of each of the pages from APCo Exhibits 16, 17, and 20 identified in Attachment A of its April 16 motion. These copies, which the Docketing and Service Branch will incorporate into the redacted versions of the exhibits, should have all information except the page heading and the Bates number expunged and each should bear the notation "All Information on This Page Redacted as Proprietary per Licensing Board Order."

During the period the Board retains jurisdiction over this proceeding, any member of the public seeking review or

disclosure of the sealed portions of the exhibits in question should direct that request to the Board.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD



G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland

May 1, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

ALABAMA POWER COMPANY

(Joseph M. Farley Nuclear Plant,
Units 1 and 2)

Docket No.(s) 50-343/364-C1VP

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O (..GRANT'G APCO MOT...) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Office of the Secretary of the Commission