

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE SECRETARY

In the Matter of:)	
)	
)	NRC-2021-0099
EXELON GENERATION COMPANY, LLC; EXELON CORPORATION;)	
EXELON FITZPATRICK, LLC; NINE MILE POINT NUCLEAR STATION, LLC; R. E. GINNA NUCLEAR POWER PLANT, LLC; and CALVERT CLIFFS NUCLEAR POWER PLANT, LLC)	Docket Nos.: STN 50-456, STN 50-457, 72-73, STN 50-454, STN 50-455, 72-68, 50-317, 50-318, 72-8, 50-461, 72-1046, 50-10, 50-237, 50-249, 72-37, 50-333, 72-12, 50-373, 50-374, 72-70, 50-352, 50-353, 72-65, 50-220, 50-410, 72-1036, 50-171, 50-277, 50-278, 72-29, 50-254, 50-265, 72-53, 50-244, 72-67, 50-272, 50-311, 72-48, 50-289, 72-77, 50-295, 50-304, and 72-1037 -LT
(Braidwood Station, Units 1 and 2; Byron Station, Unit Nos. 1 and 2; Calvert Cliffs Nuclear Power Plant, Units 1 and 2; Clinton Power Station, Unit No. 1; Dresden Nuclear Power Station, Units 1, 2, and 3; James A. FitzPatrick Nuclear Power Plant; LaSalle County Station, Units 1 and 2; Limerick Generating Station, Units 1 and 2; Nine Mile Point Nuclear Station, Units 1 and 2; Peach Bottom Atomic Power Station, Units 1, 2, and 3; Quad Cities Nuclear Power Station, Units 1 and 2; R. E. Ginna Nuclear Power Plant; Salem Nuclear Generating Station, Unit Nos. 1 and 2; Three Mile Island Nuclear Station, Unit 1; Zion Nuclear Power Station, Units 1 and 2; and Associated Independent Spent Fuel Storage Installations))	June 17, 2021

THE PEOPLE OF THE STATE OF ILLINOIS' MOTION TO ENTER SECOND AMENDED PROTECTIVE ORDER

I. INTRODUCTION

Movant, the People of the State of Illinois by the Attorney General Kwame Raoul (“the State of Illinois”) have a strong interest in the Petitioners’ request to transfer the ownership and operation of 14 Illinois-based nuclear power generation facilities, both operating and closed, along with the associated Independent Spent Fuel Storage Installation located at these facilities. Petitioner seeks to transfer ownership and operation to “Spinco”, and entity not yet formed, with no operating history, and with no publicly available financial information. The State of Illinois has a strong interest in ensuring that any new operator has both the expertise and financial wherewithal to safely operate, close, and properly decommission these Illinois-based units.

Unfortunately, the Petitioners redacted all pertinent financial information about “Spinco”, and another to-be-formed holding company, “Holdco” from their Petition. The State of Illinois and Petitioner have discussed the terms of a Protective Order, and first Amended Protective Order, to make the necessary financial information available to the State for review. Although the initial discussions were productive, the most recent version of the Protective Order contains language that would require knowing violation of an Illinois Statute, the Illinois State Public Records Act, 5 ILCS 160 *et seq.* To avoid such violation, in discussions with Petitioners and an attempt to resolve its concerns, the State proposed very minor modifications to the first Amended Protective Order, which would allow for protection of Petitioner’s legitimate interests while maintaining compliance with Illinois Law. A ‘redlined’ copy of the proposed Second Amended Protective Order is attached hereto as *Exhibit A*. A ‘clean’ copy of the proposed Order is attached as *Exhibit B*.

II. AMENDMENT AS REQUESTED IS NECESSARY TO COMPLY WITH ILLINOIS LAW

The first Amended Protective order requires the return or destruction of all financial information produced to the State for its evaluation of “Spinco’s” and “Holdco’s” ability to operate and decommissions Illinois’ nuclear facilities, as follows:

18. Within 10 days of the Access Termination Date, Petitioners [including the State of Illinois] shall either destroy all materials containing SUNSI or return such materials to the Applicants.

This requirement conflicts directly with established Illinois Law, and would in fact, constitute a criminal act. Section 3 of the Illinois State Public Records Act, 5 ILCS 5/160(3) provides, in pertinent part, as follows:

- (a) All records created or received by or under the authority of or coming into the custody, control, or possession of public officials of this State in the course of their public duties are the property of the State. These records may not be mutilated, destroyed, transferred, removed, or otherwise damaged or disposed of, in whole or in part, except as provided by law....

Records are broadly defined in the Illinois State Public Records Act. Section 2 of the Act, 5 ILCS 160(2) provides the following definition:

"Record" or "records" means all books, papers, born-digital electronic material, digitized electronic material, electronic material with a combination of digitized and born-digital material, maps, photographs, databases, or other official documentary materials, regardless of physical form or characteristics, made, produced, executed, or received by any agency in the State in pursuance of State law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its successor as evidence of the organization, function, policies, decisions, procedures, operations, or other activities of the State or of the State Government, or because of the informational data contained therein.

The financial information which the State of Illinois seeks would clearly be a State “Record” as that term is defined in the Illinois State Public Records Act.

The Penalties for destruction or return of return of the financial information as specified in the First Amended Protective Order would be severe. Section 11 of the Illinois State Records Act provides:

Sec. 11. Violation. All records made or received by or under the authority of or coming into the custody, control or possession of public officials of this State in the course of their public duties are the property of the State and shall not be mutilated, destroyed, transferred, removed or otherwise damaged or disposed of, in whole or in part except as provided by law. Any person who knowingly and without lawful authority alters, destroys, defaces, removes, or conceals any public record commits a Class 4 felony.

Petitioners object to the State of Illinois' proposed amendment by claiming that the language "except as provided by law" provides an exception in this case, where the provisions of the NRC's protective order require return or destruction. However, this is an incorrect interpretation of the Illinois law.

There is no case law directly on point addressing Petitioner's position. However, in accordance with the Illinois Attorney General Act, 15 ILCS 205, the Illinois Attorney General is empowered to provide opinions on matters of statutory interpretation. The undersigned has consulted with the Public Access and Opinions Division of the Illinois Attorney General's Office, which has advised that provisions in a protective order entered by a court or administrative agency, do not constitute an exception to the requirements of the State Records Act under the "except as provided by law" language in 5 ILCS 5/160(3).

The opinion of the Illinois Attorney General is dispositive on this issue. The State cannot enter into an agreement to destroy or return all copies of the information provided because it would violate the State Public Records Act. At least one copy must be retained as a State Record.

The retention of a single copy of the financial information provided, in accordance with the requirements of Illinois law, will not prejudice the Petitioner. The State of Illinois's proposed amendment provides:

18. Within 10 days of the Access Termination Date, Petitioners shall either destroy all materials containing SUNSI or return such materials to the Applicants, provided however that in accordance with the requirements of the Illinois State Records Act, 5 ILCS 160 *et seq.*, Susan L. Satter and Christopher J. Grant, Counsel for the State of Illinois, may retain archive copies of the work product, court filings and official transcripts and exhibits, and one complete set of SUNSI, provided that Counsel continue to treat the information in a manner consistent with this Order. All other Authorized Recipients (“Covered Petitioners”) shall take those actions necessary for the Covered Petitioners to satisfy this obligation. Within 10 days of the Access Termination Date, each Covered Petitioner shall execute the attached Termination of Possession Declaration (“Attachment 2”), stating that the SUNSI within his or her possession or control has been returned or destroyed. Within 10 days of the Access Termination Date, the Covered Petitioners shall file all executed Termination of Possession Declarations via EIE and also shall e-mail copies of those executed Declarations to counsel for the Applicants.

The State of Illinois agrees to treat the financial information “...in a manner consistent with this Order”. Further, Petitioners can ensure confidentiality of the information. Section 7 of the Illinois Freedom of Information Act, 5 ILCS 140(7) provides, in pertinent part, as follows:

Sec.7. Exemptions.

(1) When a request is made to inspect or copy a public record that contains information that is exempt from disclosure under this Section, but also contains information that is not exempt from disclosure, the public body may elect to redact the information that is exempt. The public body shall make the remaining information available for inspection and copying. Subject to this requirement, the following shall be exempt from inspection and copying:

* * *

(g) Trade secrets and commercial or financial information obtained from a person or business where the trade secrets or commercial or financial information are furnished under a claim that they are proprietary, privileged or confidential, and that disclosure of the trade secrets or commercial or financial information that would cause competitive harm to the person or business and only insofar as the claim directly applies to the records requested.

In accordance with the provisions of 5 ILCS 140(7), Petitioners can protect the information provided from disclosure by making an appropriate claim that the information is proprietary, privileged or confidential.

III. CERTIFICATION OF ATTORNEY PURSUANT TO 10 CFR 2.323(b)

I, Christopher Grant, an attorney, certify that on June 11, June 14 and June 15, I consulted with counsel for Petitioners regarding the statutory issues raised herein, but that the relief requested was denied and the parties were unable to resolve the matters discussed in this Motion through agreed amendment to the Protective Order.

IV. CONCLUSION

The State of Illinois has a significant interest in this matter and requires access to all relevant financial information related to the proposed license transfers. Although the State is willing to execute a protective order to protect disclosed SUNSI, it is prohibited by Illinois Law from agreeing to destroy or return SUNSI as required in the first Amended Protective Order. The State of Illinois has proposed a minor amendment which will allow it to comply with the Illinois State Public Records Act, which will adequately protect Petitioners' legitimate interest in the confidentiality of financial information disclosed. The State of Illinois requests that the Commission grant this Motion and enter the State of Illinois' proposed Second Amended Protective Order.

DATED: June 17, 2021

Respectfully submitted,
/Signed (electronically) by/

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