

January 12, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

January 12, 2005 (12:35pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)

ENTERGY NUCLEAR VERMONT)
YANKEE, LLC and ENTERGY)
NUCLEAR OPERATIONS, INC.)
(Vermont Yankee Nuclear Power Station))

Docket No. 50-271

ASLBP No. 04-832-02-OLA
(Operating License Amendment)

**ENTERGY'S MOTION FOR PROTECTIVE ORDER GOVERNING
ACCESS TO AND DISCLOSURE OF TRADE SECRETS AND
CONFIDENTIAL COMMERCIAL OR FINANCIAL INFORMATION**

Pursuant to 10 C.F.R. §2.323, Applicants Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively "Entergy") hereby files this motion seeking that the Atomic Safety and Licensing Board ("Board") issue a Protective Order governing access to and disclosure of certain information constituting trade secrets and confidential commercial or financial information of Entergy and its vendors and contractors. Entergy requests that the Board adopt the enclosed draft Protective Order and the Confidentiality and Non-Disclosure Agreement attached to the draft Protective Order.

DISCUSSION

The need for a Protective Order arises from the general discovery provisions in 10 C.F.R. §2.336. Under those provisions, Entergy is required to furnish to the Vermont Department of Public Service ("DPS") and the New England Coalition ("NEC") all documents that are relevant to their respective contentions admitted into this proceeding, and provide to the NRC Staff all

documents relevant to the admitted DPS and NEC contentions.¹ Included among the documents to be provided are a significant number that contain proprietary trade secrets and commercial and financial information that should be held in confidence by the NRC pursuant to the policy reflected in 10 C.F.R. §§2.390(a)(4) and 9.17(a)(4). Further, the continuing duty of disclosure established by 10 C.F.R. §2.336(d) may require the production to DPS, NEC and the NRC Staff of a number of additional documents containing similar confidential information.

Protection in NRC proceedings of the confidentiality of documents containing proprietary trade secrets and commercial and financial information is normally achieved via private agreement between parties other than the NRC Staff. In this case, Entergy provided draft agreements to counsel for DPS and NEC. Counsel for DPS advised that they are reviewing the draft agreements. Counsel for NEC advised Entergy counsel that NEC did not wish to sign the draft agreements, but first wanted to review what it described as a "privilege log" setting forth a description of all documents believed by Entergy to be confidential, including the document title, author and author's affiliation, number of pages, a "sufficient description to clearly identify the document," the basis for a claim of privilege, the entity on whose behalf the claim is asserted, and the authority under which the claim is asserted.² Entergy counsel explained to counsel for NEC that the document review process that Entergy has had underway for several months did not include preparation of the type of "privilege log" sought by NEC and that generating such information at this late date would entail substantial additional cost and delay.³

¹ The NRC Staff has advised the Board and the parties of its intent to participate in this proceeding as a party with respect to all admitted contentions. Letter from Staff counsel to the Board dated December 28, 2004.

² Proprietary information is not privileged, but subject to restrictions on the use the recipient can make of it. Entergy is preparing and will submit on January 18 a list of documents withheld from disclosure on the basis of privilege (e.g., attorney-client communications).

³ Counsel for Entergy had first approached NEC counsel immediately after the October 21-22, 2004 prehearing conference seeking to discuss the handling of proprietary information that Entergy would be disclosing pursuant to 10 C.F.R. § 2.336. Counsel for Entergy also sought unsuccessfully to initiate discussions on this topic on several occasions in November and December, 2004. Not until the issuance of an e-mail from its counsel on January 11, 2005 did NEC set forth its objections to the protective agreement process.

Protection of the confidentiality of documents provided to the NRC Staff in the course of the Staff's review of the application is typically provided by following the procedures set forth in 10 C.F.R. §2.390(b) for submittal of such documents to the NRC Staff. However, where as here a potentially large number of documents that would need to be provided to the NRC Staff in the document disclosure process, those procedures would require the documents to be identified, marked, redacted, and justified via affidavit and the process repeated a number of times. Thus, in the document disclosure process of 10 C.F.R. § 2.336, the procedures of 10 C.F.R. § 2.390(b) become extraordinarily burdensome on the producing party and may impair its ability to comply with the requirements of 10 C.F.R. § 2.336(a) in a timely manner. Counsel for the NRC Staff advised Entergy counsel that it could only provide confidentiality protection by the procedures of 10 C.F.R. § 2.390(b). In other words, the route of providing protection for proprietary documents made available to the NRC Staff in document disclosure did not appear to be available.

This situation leaves the issuance of a Protective Order by the Board covering access to and disclosure of proprietary trade secrets and commercial and financial information in this proceeding as the only mechanism readily available, at least with respect to disclosures to NEC and the NRC Staff. In view of that fact, Entergy counsel on January 11 discussed the Protective Order approach with counsel for NEC, DPS and the NRC Staff. NRC Staff counsel stated that the Staff would promptly respond to this motion. Entergy presumes that NEC and DPS will also.

The requested Protective Order (which is closely patterned after one recently proposed by the NRC Staff in another proceeding) would cover all documents that will be provided pursuant to the general disclosure obligations of 10 C.F.R. § 2.336, as well as documents included in the hearing file. The Protective Order would establish procedures for the disclosure of proprietary trade secrets and commercial and financial information to the parties and restrict the distribution

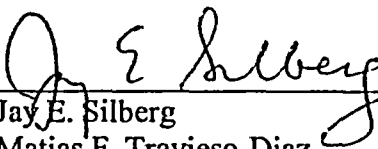
of such information to authorized persons pursuant to a Confidentiality and Non-Disclosure Agreement.

Entergy anticipates that it will be prepared to make its initial document disclosures for both confidential and non-confidential information on January 18, 2005 (the current due date). If protective agreements with NEC and/or DPS are in place by that date, Entergy will provide all documents on the current schedule to the signatory parties. Similarly, if a Protective Order is in place by the date, all documents will be made available to all parties. However, absent protective agreements or if a Protective Order is not in place when Entergy makes its initial disclosures on January 18, 2005, Entergy will provide relevant documents to the NEC, DPS and the NRC Staff, excepting those containing proprietary trade secrets and commercial and financial information. The latter will be provided promptly following issuance of a Protective Order or after other suitable arrangements have been made to protect such documents from disclosure.

CONCLUSION

For the reasons stated above, Entergy requests that the Board issue a Protective Order in the form attached.

Respectfully submitted,



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Counsel for Entergy Nuclear Vermont Yankee,
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Dated: January 12, 2005

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Atomic Safety and Licensing Board

Before Administrative Judges:

Alex S. Karlin, Chairman
Dr. Anthony J. Baratta
Lester S. Rubenstein

In the Matter of

ENTERGY NUCLEAR VERMONT
YANKEE, LLC and ENTERGY
NUCLEAR OPERATIONS, INC.
(Vermont Yankee Nuclear Power Station)

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)
) Docket No. 50-271

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) ASLBP No. 04-832-02-OLA
) (Operating License Amendment)
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**MEMORANDUM AND ORDER
(Protective Order)**

This Protective Order governs the disclosure and use in this proceeding of certain documentation containing proprietary trade secrets and commercial and financial information of Applicants Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively "Entergy") and Entergy's vendors and contractors. Pursuant to this Protective Order, counsel, employees, consultants and others representing the Vermont Department of Public Service, ("DPS") the New England Coalition ("NEC"), and the NRC Staff ("Staff") shall be permitted access to documentation containing proprietary trade secrets and commercial and financial information of Entergy and Entergy's vendors and contractors upon the following conditions:

1. Documents identified by Entergy as "proprietary" shall be deemed to contain proprietary trade secrets and commercial and financial information required to be held in confidence pursuant to the policy reflected in 10 C.F.R. §§ 2.390(a)(4) and 9.17(a)(4) ("Proprietary Information Required to Be Held in Confidence"). If any party does not agree to

treat specific documents identified by Entergy as “proprietary” as requiring confidential treatment hereunder, such party may request within seven (7) business days of its receipt of a such documents that the Atomic Safety and Licensing Board (“Board”) rule on whether the documents at issue be held in confidence under the terms of this Protective Order. During the seven-day period, and pending a ruling by the Board, the documents in question shall continue to be held in confidence as provided herein. Should the Board rule that any documents should not be held in confidence, unrestricted use of such documents shall not take place until the later of ten business days after the Board so orders, or, if Entergy files an interlocutory appeal or requests a stay of such ruling, the date upon which such appeal or request is decided; provided, however, that such period of time may be extended in accordance with any stay ordered by the Board or a reviewing court.

2. Only individual counsel, consultants, employees and others representing DPS, NEC or the Staff may have access to documents deemed to contain Proprietary Information Required to Be Held in Confidence. Such documents shall not be used except as necessary for the conduct of this proceeding, and shall not be disclosed in any manner to any person except those engaged in the conduct of this proceeding and who need to know the information contained in the documents in order to carry out their responsibilities in this proceeding. Individuals with access to such documents may make copies of and take notes on the confidential information contained in the documents, but such copies and notes become subject to the terms of this Protective Order.

3. Any person permitted access to documents deemed to contain Proprietary Information Required to Be Held in Confidence shall execute the attached Confidentiality and Non-Disclosure Agreement.

4. Counsel, consultants, employees and others representing a party who receive documents subject to the terms of this Protective Order shall maintain the confidentiality of the

information contained therein as required in the attached Confidentiality and Non-Disclosure Agreement, the terms of which are incorporated herein.

5. All pleadings and correspondence in this proceeding that contain Proprietary Information Required to Be Held in Confidence pursuant to this Protective Order shall:

a. Be served by electronic mail, with an additional paper copy served in a single, opaque envelope by United States first class, registered, express, or certified mail, internal NRC mail, messenger-courier, or overnight delivery service;

b. Include an attached cover sheet identifying the pleading or correspondence as containing Proprietary Information Required to Be Held in Confidence and a cover letter that describes the contents of the pleading or correspondence without reference to such information;

c. Be served only on the Board, the NRC's Office of the Secretary, and persons authorized to receive such information pursuant to this Protective Order.

6. Counsel shall take all reasonable precautions necessary to assure that Proprietary Information Required to Be Held in Confidence is not distributed to unauthorized persons. Counsel are responsible for ensuring that persons under their supervision or control comply with this Protective Order.

7. Proprietary Information Required to Be Held in Confidence shall remain available to all parties until the later of the date that an order terminating this proceeding is no longer subject to judicial review, or the date that any other Commission proceeding relating to such information is concluded and no longer subject to judicial review. The parties shall, within fifteen (15) days of the later date described above, return the documents containing such information to counsel for Entergy or shall destroy that information and advise counsel for Entergy of such destruction, except that copies of filings, transcripts and exhibits in this proceeding that contain such information may be retained if they are maintained in a secure place such that no distribution of the information to unauthorized individuals will occur. Within such time period, each party

receiving Proprietary Information Required to Be Held in Confidence shall also submit to counsel for Entergy an affidavit stating that, to the best of its knowledge, all documents containing such information have been returned, have been destroyed, or will be maintained in a secure place such that no distribution of the information to unauthorized individuals will occur. To the extent that documents that contain Proprietary Information Required to Be Held in Confidence are not returned or destroyed, they shall remain subject to the provisions of this Protective Order.

8. Counsel, consultants, employees or any other individuals representing a party who have reason to believe that Proprietary Information Required to Be Held in Confidence may have been lost or misplaced or may have otherwise become available to unauthorized persons during the pendency of this proceeding shall notify the Board and counsel for Entergy promptly of their concerns and the reasons for them.

9. Any violation of the terms of this Protective Order or a Confidentiality and Non-Disclosure Agreement executed in furtherance of this Protective Order may result in the imposition of such sanctions as the Board may deem appropriate, including but not limited to referral of the violation to appropriate bar associations and/or other disciplinary authorities.

10. The Board may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
January xx, 2005

ATTACHMENT

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

In the Matter of)	
)	
)	Docket No. 50-271
ENTERGY NUCLEAR VERMONT)	
YANKEE, LLC and ENTERGY)	ASLBP No. 04-832-02-OLA
NUCLEAR OPERATIONS, INC.)	(Operating License Amendment)
(Vermont Yankee Nuclear Power Station))	
)	

CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT

Under penalty of perjury, I hereby certify that: access to Proprietary Information Required to Be Held in Confidence is provided to me pursuant to the terms and restrictions of the Atomic Safety and Licensing Board's ("Board's") Protective Order, dated January __, 2005, in this proceeding; that I have been given a copy and have read said Protective Order; and that I agree to be bound by it. I understand that the contents of the Proprietary Information Required to Be Held in Confidence, and any notes or other memoranda, or any form of information that copies or discloses proprietary information to be held in confidence shall not be disclosed to anyone except in accordance with that Protective Order. I acknowledge that a violation of this agreement or the Protective Order, which incorporates the terms of this agreement, constitutes a violation of an order of the Nuclear Regulatory Commission and may result in the imposition of such sanctions as the Board or the Commission may deem to be appropriate.

WHEREFORE, I do solemnly agree to protect such Proprietary Information Required to Be Held in Confidence as may be disclosed to me in this NRC proceeding, in accordance with the terms of this agreement.

Name (printed): _____

Title: _____

Employed by or Representing: _____

Signature: _____

Date: _____

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)	
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ENTERGY NUCLEAR VERMONT)	Docket No. 50-271
YANKEE, LLC and ENTERGY)	
NUCLEAR OPERATIONS, INC.)	ASLBP No. 04-832-02-OLA
(Vermont Yankee Nuclear Power Station))	(Operating License Amendment)
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Motion for Protective Order Governing Access to and Disclosure of Trade Secrets and Confidential Commercial or Financial Information" were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 12th day of January, 2005.

*Administrative Judge
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