

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael M. Gibson, Chairman
Dr. Gary S. Arnold
Nicholas G. Trikouros

In the Matter of

NORTHERN STATES POWER CO.

(Prairie Island Nuclear Generating Plant
Independent Spent Fuel Storage Installation)

Docket No. 72-10-ISFSI-2

ASLBP No. 12-922-01-ISFSI-MLR-BD01

March 5, 2013

PROTECTIVE ORDER

(Governing Non-Disclosure of Certain Documents Claimed to be Proprietary)

This protective order governs the disclosure and use in this proceeding of documents that Northern States Power Company (NSPM) or the Prairie Island Indian Community (PIIC) claim contain trade secrets and/or privileged and confidential commercial and financial information (hereinafter "Proprietary Documents").¹ Pursuant to this protective order, counsel, witnesses, employees, consultants, and others representing the parties² who request copies of Proprietary Documents shall be permitted access to such documents upon the conditions set

¹ The provisions of this protective order do not restrict NRC counsel, witnesses, employees, consultants and others representing the NRC Staff from using documents containing protected material that the NRC is entitled to receive apart from its role as a litigant in this proceeding (e.g., documents containing information required to be submitted to the NRC by statute, regulation, or license condition or information submitted to, or acquired by the NRC in support of a requested licensing action or in fulfillment of its regulatory responsibilities). Rather, NRC's use of such documents is governed by 10 C.F.R. §§ 2.390, 2.709, 9.17, and 9.25. The provisions of this protective order apply to NRC counsel, witnesses, employees, consultants, and others representing the NRC Staff with respect to documents containing protected material that NRC receives solely pursuant to 10 C.F.R. § 2.336 and this protective order.

² The NRC Staff notified the Board on January 4, 2013 that it intended to participate as a party, pursuant to 10 CFR § 2.1202(b)(ii)(2). Since the Staff has notified the presiding officer that it chooses to participate as a party, it has all the rights and responsibilities of a party. 10 C.F.R. § 2.1202(b)(2).

forth herein.

I. Procedural Posture

Each party to this proceeding is required to disclose and provide all documents relevant to the admitted contentions, except those documents for which a claim of privilege or protected status is being made.³ In the latter case, the party must ordinarily list such documents on a privilege log.⁴ Although the parties have agreed to waive the requirement in 10 C.F.R. § 2.336(a)(3) to produce a privilege log,⁵ they have agreed to produce a list of documents withheld as proprietary.⁶

In furtherance of these disclosure obligations and after conferring with the other parties in this proceeding, on February 28, 2013, the parties moved the Atomic Safety and Licensing Board (Board) to issue a proposed protective order and non-disclosure agreement.⁷ The proposal relates only to those documents that NSPM or the PIIC claim to be Proprietary Documents. No party has proposed disclosure of documents protected by other privileges.

II. Terms and Conditions of Protective Order

After due consideration of the proposed protective order and non-disclosure agreement, the public interest in an open and public hearing, and the practical and efficient conduct of this proceeding, the Board issues the following protective order:

1. If NSPM or the PIIC maintains that a document, otherwise required to be disclosed, contains information that qualifies for protection under 10 C.F.R. § 2.390(a)(4) and (b)(4)(i)-(v), then such party may designate it on its list of documents withheld as proprietary, and it shall be protected in accordance with the terms and conditions of this order. Such documents shall

³ 10 C.F.R. § 2.336(a)(2).

⁴ Id. § 2.336(a)(3).

⁵ Licensing Board Amended Initial Scheduling Order (Feb. 1, 2013) at 4 (unpublished).

⁶ Id.

⁷ Joint Motion for Protective Order and Non-Disclosure Agreement Regarding Proprietary Documents (Feb. 28, 2013).

hereinafter be referred to as "Proprietary Documents."

2. Upon request of NSPM or PIIC, the party claiming protected status for a Proprietary Document shall provide an unredacted copy of such document to the duly authorized representatives of the requesting party who have signed the non-disclosure agreement attached hereto. Upon the request of NRC Staff counsel, the party claiming protected status for a Proprietary Document shall provide an unredacted copy of such document to the NRC Staff Counsel. Each such Proprietary Document produced shall be marked on the first page with a conspicuous "Proprietary" label. The party representatives receiving such Proprietary Documents shall hold and use such documents in confidence and in compliance with the terms and conditions of this order.⁸

3. If upon receipt and review of a Proprietary Document, the requesting party determines that such document does not appear to qualify for protection under 10 C.F.R. § 2.390(a)(4) and (b)(4)(i)-(v), the receiving party may file a motion with the Board challenging such designation. Absent good cause shown, any such motion shall be filed within ten days of the moving party's receipt of the Proprietary Document. Prior to presenting any such dispute to the Board, the parties shall consult and use their best efforts to resolve their dispute.

4. If a party has filed a motion under the preceding paragraph then, pending a ruling by the Board, the Proprietary Document in question shall continue to be held in confidence. If the Board rules that a document does not qualify as a Proprietary Document, then the unrestricted use of such documents may begin twenty-five (25) days after the Board's decision. If, during such time, the party that asserted protected status of the document files an interlocutory appeal

⁸ This order, and the good faith representation and designation of documents as Proprietary Documents by counsel for the producing party, serves in lieu of the requirement for marking and for an affidavit under 10 C.F.R. § 2.390(b) and allows the Staff to receive Proprietary Documents and to protect their confidentiality under FOIA. Nothing in this Order shall be interpreted to prevent the NRC from discharging its obligation to determine the release or retention of documents in its possession and control in accordance with federal regulation or statute.

or request that the issue be certified to the Commission, such period of time shall be extended until such time as the Board or the Commission rules on the appeal or request for certification.

5. Only individual counsel, consultants, witnesses, employees, and other representatives of the requesting parties who have executed the attached non-disclosure agreement, NRC Staff and its counsel, and the Board and its staff, may have access to Proprietary Documents.⁹ Proprietary Documents shall only be used as necessary for the conduct of this proceeding. Proprietary Documents shall not be disclosed in any manner to any person except (a) the Board and its staff; (b) the NRC Staff and its counsel; and (c) those representatives of NSPM and PIIC engaged in the conduct of this proceeding who have executed the non-disclosure agreement and who, in the reasonable opinion of the party who has received the Proprietary Documents, need to know the information contained in the Proprietary Documents in order to carry out their responsibilities in this proceeding. Individuals with access to Proprietary Documents may make copies of and take notes on the confidential information contained in the documents, but such copies and notes become Proprietary Documents subject to the terms of this protective order.

6. Counsel, consultants, witnesses, 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 non-disclosure agreement, the terms of which are incorporated herein.

7. Counsel shall take all reasonable precautions necessary to assure that Proprietary

⁹ Except for the Board and its staff and the NRC Staff and its counsel, each person who is authorized by this Protective Order to inspect or have access to Proprietary Documents, and who does inspect any such material, shall, before conducting such inspection or having such access, be provided with a copy of this protective order and shall execute the non-disclosure agreement. All parties to this proceeding shall be bound by this Protective Order, the provisions of the Trade Secrets Act and the Commission's regulations at 10 C.F.R. § 2.390(b)(6). Any further use or disclosure of the trade secrets and/or privileged and confidential commercial and financial information contained in the Proprietary Documents is subject to the terms of this Protective Order.

Documents and the information contained therein are not distributed to unauthorized persons and that persons under their supervision or control comply with this protective order.

8. A party intending to file or submit any pleading, testimony, exhibit, or correspondence in this proceeding that contains a Proprietary Document or information derived from a Proprietary Document, shall provide written notification to the party that originally asserted protected status no less than ten (10) days prior to the date of the intended filing. Such notice shall identify the Proprietary Document(s) that the party intends to use or include.

9. All pleadings, testimony, exhibits and correspondence in this proceeding that include a Proprietary Document or contain information derived from such a document shall:

a. Be served electronically using the NRC Electronic Submittal instructions applicable to submissions governed by protective order and designating for electronic service only those representatives of the parties who are authorized to receive the Proprietary Document and who have signed the non-disclosure agreement, the Board, and the Secretary;

b. Include an attached cover sheet identifying the pleading, testimony, exhibit, or correspondence as containing a Proprietary Document or information derived therefrom;

c. Specifically designate, by highlighting, marginalia, or other appropriate markings, the portion of the pleading, testimony, exhibit or correspondence, that contains a Proprietary Document or information derived therefrom; and

d. Be accompanied by a version of the pleading, testimony, exhibit and/or correspondence with the proprietary information redacted unless the party filing the pleading, testimony, exhibit and/or correspondence in good faith determines that such a redacted version cannot be prepared without undue burden or expense and so advises the Board and the other parties.

10. At any hearing or conference in this proceeding in which a statement is made by the representative of a party, or a witness is questioned, concerning a Proprietary Document or information contained therein, the statement or testimony shall be given in camera or under

other suitable conditions as this Board may establish, and the record of that portion of the hearing and any transcript thereof shall be withheld from distribution to the public. It shall be the duty of the party whose statement or testimony contains information contained in a Proprietary Document to notify the Board and the parties that such testimony or statement will contain proprietary information, prior to the testimony or statement being made.

11. Proprietary Documents shall remain available until the date that an order terminating this proceeding is no longer subject to judicial review. Each party shall, within fifteen (15) days of the date described above, return the Proprietary Documents to counsel for the party that provided them or shall destroy such documents and shall submit to counsel for the disclosing party an affidavit stating that, to the best of its knowledge, all Proprietary Documents have been returned or destroyed. Pending their return or destruction, Proprietary Documents shall remain subject to the provisions of this protective order.

12. Counsel, consultants, employees, or any other individuals representing a party who have reason to believe that Proprietary Documents may have been lost or misplaced or may have otherwise become available to unauthorized persons shall promptly notify the Board and counsel for the disclosing party of their concerns and the reasons for them.

13. Any violation of the terms of this protective order or a non-disclosure agreement executed in furtherance of this 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.

14. Each party governed by this protective order has the right to seek changes in it as appropriate from the Board or the Commission.

15. Nothing in this protective order shall be deemed to preclude any party from independently seeking, through discovery in any other administrative or judicial proceeding, any Proprietary Document or information produced in this proceeding under this protective order. In addition, if documents identified in this proceeding as Proprietary Documents, or some or all of

the information contained therein, come into the possession of or are known by any party independently of the document being produced in this proceeding, use of that document or information thus obtained in this proceeding, without compliance with the terms of this protective order, shall not be a violation of the terms of this protective order. The party asserting independent knowledge of the contents of Proprietary Documents or independent access to such documents shall have the burden of proving that such information was independently obtained.

16. 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

/RA/

Michael M. Gibson
CHAIRMAN

Rockville, Maryland

March 5, 2013

ATTACHMENT A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael M. Gibson, Chairman
Dr. Gary S. Arnold
Nicholas G. Trikouros

In the Matter of

NORTHERN STATES POWER CO.

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March 5, 2013

NON-DISCLOSURE AGREEMENT

Under penalty of perjury, I hereby certify that: access to Proprietary Documents is provided to me pursuant to the terms and restrictions of the Atomic Safety and Licensing Board's Protective Order, dated March 5, 2013 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 and agree that Proprietary Documents, their contents, or any notes or other memoranda summarizing or otherwise describing their contents, or any form of information that derives from the Proprietary Documents and copies or discloses the contents of the Proprietary Documents, shall be held in confidence, shall not be disclosed to anyone except in accordance with that Protective Order, and shall be used in conjunction with this proceeding. I acknowledge that a violation of this agreement, or of 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 Documents, and their contents, as may be disclosed to me in this NRC proceeding, in accordance with the terms of this agreement.

Name (printed): _____

Title: _____

Signature: _____

Date: _____

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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| In the Matter of |) | |
| |) | |
| Northern States Power Company |) | Docket No. 72-10-ISFSI-2 |
| |) | |
| (Prairie Island Nuclear Generating Plant, |) | |
| Independent Spent Fuel Storage Installation) |) | |
| |) | |
| |) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **PROTECTIVE ORDER (Governing Non-Disclosure of Certain Documents Claimed to be Proprietary)** have been served upon the following persons by Electronic Information Exchange or by electronic mail as indicated by an asterisk*.

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Prairie Island Nuclear Generating Plant, Independent Spent Fuel Storage Installation,
Docket No. 72-10-ISFSI

**PROTECTIVE ORDER (Governing Non-Disclosure of Certain Documents Claimed to be
Proprietary)**

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[Original signed by Herald M. Speiser _____]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 5th day of March, 2013