

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

BEFORE THE CHIEF ADMINISTRATIVE JUDGE

IN THE MATTER OF)	
)	
SOUTH TEXAS PROJECT NUCLEAR OPERATING)	
COMPANY, NRG SOUTH TEXAS 3, LLC, NRG SOUTH)	
TEXAS 4, LLC, and the CITY PUBLIC SERVICE)	Docket Nos. 52-012-COL
BOARD acting for the CITY OF SAN ANTONIO, TEXAS)	52-013-COL
)	
(Combined License Application for South Texas)	
Project Units 3 and 4))	

NRC STAFF REPLY TO PETITIONERS' CHALLENGE OF
THE NRC STAFF DENIAL OF ACCESS TO SUNSI

In accordance with the Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation (SUNSI/SGI Order), the Nuclear Regulatory Commission (NRC) Staff files this reply to the challenge filed by Robert Eye, Karen Hadden for the SEED Coalition, Eliza Brown for the SEED Coalition, Matthew Johnson for Public Citizen's Texas Office, Susan Dancer, and Bill Wagner (Petitioners). After reviewing the original SUNSI request and the appeal challenging the NRC Staff's determination, the Staff maintains that the Petitioners have not met the requirements of the SUNSI/SGI Order for access to SUNSI.

BACKGROUND

South Texas Project Nuclear Operating Company, NRG South Texas 3, LLC, NRG South Texas 4, LLC, and the City Public Service Board acting for the City of San Antonio, Texas (Applicants) filed an application with the NRC for combined licenses for two nuclear power plants to be located in Matagorda County, Texas (Application). The Application was accepted for docketing on November 29, 2007. A Notice of Hearing along with the SUNSI/SGI Order was

published in the *Federal Register* on February 20, 2009. (74 Fed. Reg. 7934). On March 2, 2009, the Petitioners submitted a “Request for Sensitive Unclassified Non-Safeguards Information (SUNSI) regarding Combined License Application for the South Texas Project Nuclear Power Plant Units 3 and 4” (SUNSI Request). After reviewing the SUNSI Request, the NRC Staff denied the request in a letter dated March 12, 2009 (Staff Denial). The Petitioners challenged the NRC Staff’s determination in a letter dated March 17, 2009 (SUNSI Challenge).

DISCUSSION

The NRC Staff’s reasons for denial of the SUNSI Request are fully set forth in the Staff Denial letter. Although the NRC Staff identified specific information that the Petitioners did not include in their SUNSI Request, the missing information was not included in the SUNSI Challenge, and the NRC Staff’s determination to deny access to SUNSI remains valid. The Petitioners must provide enough information for the NRC Staff to determine whether (1) there is a reasonable basis to believe a petitioner is likely to establish standing to participate in this NRC proceeding, and (2) there is a legitimate need for access to SUNSI.

A. Standing

The SUNSI Request provided enough information to determine that there is a reasonable basis to believe that Susan Dancer and Bill Wagner would likely establish standing, but the SUNSI Request did not provide enough information to demonstrate that either the SEED Coalition or Public Citizen is likely to establish standing. The Staff Denial explained that organizations can establish standing in two ways (organizational standing or representational standing). In the SUNSI Challenge, the Petitioners provide an additional explanation that both Susan Dancer and Bill Wagner are members of both the SEED Coalition and Public Citizen.

The Petitioners further explain that Ms. Dancer and Mr. Wagner have authorized the SEED Coalition and Public Citizen to represent them and request a hearing on their behalf.¹ However, the Petitioners did not provide all of the information in the SUNSI Challenge identified by the NRC Staff as missing from the SUNSI Request. The Staff Denial explained in part that, "...the interests that the organization seeks to protect must be germane to its own purpose, and neither the asserted claim nor the requested relief may require an individual member to participate in the organization's legal action."² The Petitioners have not described the organizational interests of either the SEED Coalition or Public Citizen, and have not explained how the interests that Ms. Dancer and Mr. Wagner seek to protect are germane to the organizational purpose. Without this information, the NRC Staff could not reasonably determine that either the SEED Coalition or Public Citizen would be likely to establish standing to participate in this proceeding. Therefore, the SUNSI Request and the SUNSI Challenge together do not contain enough information to change the NRC Staff's determinations on standing.

B. Need for SUNSI

The Petitioners specifically identify in the SUNSI Request only two SUNSI items to which they seek access, but generally state that there are, "literally hundreds of instances in the Environmental Report where information was not included [in the public version] for proprietary reasons...". SUNSI Request at 2. In the SUNSI Challenge, the Petitioners further describe the

¹ To avoid the concern that an individual cannot have multiple organizations represent his or her interests in a hearing, the Staff assumes for the purposes of the SUNSI access determination that either Ms. Dancer or Mr. Wagner would be represented by the SEED Coalition and the other individual would be represented by Public Citizen.

² To require this showing to reasonably determine the likelihood for representational standing, the NRC Staff relied on the precedents in *Palisades*, CLI-07-18, 65 NRC at 409; and *Private Fuel Storage*, CLI-99-10, 49 NRC at 323 (citing *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).

information they are requesting in, “[s]pecific topics of SUNSI information” to which they seek access, but they do not specifically identify the SUNSI in the Application. SUNSI Challenge at 3. The NRC Staff determined that the general reference in the SUNSI Request to “hundreds of instances” of proprietary information did not provide the information necessary to demonstrate a need for SUNSI. Even considering the topical descriptions and other information in the SUNSI Challenge, the Petitioners have not addressed the shortcomings identified by the Staff Denial. The Petitioners specifically do not comply with the terms of the SUNSI/SGI Order which provides that a potential party seeking access to SUNSI information must identify the, “... requester's need for the information in order to meaningfully participate in this adjudicatory proceeding, particularly why publicly available versions of the application would not be sufficient to provide the basis and specificity for a proffered contention.” SUNSI/SGI Order at 7936. As stated in the Staff Denial, the Petitioners should specifically identify the SUNSI to which they seek access, referencing the publicly available information from the Application, and describing why access to that SUNSI is needed to formulate the basis for a proffered contention.³ The SUNSI/SGI Order does not provide a method for general access to SUNSI or topical access to SUNSI because it provides access to only the information necessary to meaningfully participate in an adjudicatory proceeding, and, further, only grants access to the information that is necessary to provide the basis and specificity of a proffered contention.

The Petitioners’ request merely argues that, “without viewing [SUNSI], there is no way to determine if the information withheld could have significant bearing on our contentions...”, “[w]e

³ The description of the basis for a proffered contention does not need to be sufficient to support an admissible contention as in a Petition, rather, the description needs only to be specific enough to show why the publicly available information in the application is not sufficient to support an admissible contention.

believe our case could be harmed without access to this information and all other SUNSI”, “[i]f ratepayers in at least one utility market have the costs of nuclear power from STP incorporated into their electricity rates, they have the right to know the expected costs of the project, as they will be affected financially by the project”, and that SUNSI access “...is necessary in order for us to fully understand and effectively research the many issues of concern that we have identified and in order to effectively participate in the intervention process.” SUNSI Challenge pp. 2-3. The Petitioners also refer to detailed numerous additional questions and concerns submitted as comments in the environmental scoping meeting, but they do not include the additional questions and concerns in their SUNSI Request. The Petitioners do not meet the requirements of the SUNSI/SGI Order because they do not describe how they need SUNSI to meaningfully participate in this adjudicatory proceeding. Particularly, they do not describe why publicly available versions of the Application would not be sufficient to provide the basis and specificity for a proffered contention. Therefore, the SUNSI Request and the SUNSI Challenge together do not contain enough information to change the NRC Staff’s determination regarding the need for access to SUNSI.

CONCLUSION

The Petitioners provide information sufficient for the NRC Staff to reasonably determine that Ms. Dancer and Mr. Wagner are likely to establish standing in this proceeding, but the SEED Coalition and Public Citizen have not provided enough information to demonstrate that they are likely to establish standing. The Petitioners have not demonstrated a need for SUNSI information. Even considering the additional information in the SUNSI Challenge, the original determinations in the Staff Denial remain valid.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 23rd day of March, 2009

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC Staff reply to Petitioners' Challenge of the NRC Staff Denial of Access to SUNSI" and the "Notice of Appearance of James P. Biggins" have been served on the following persons by Electronic Information Exchange on this 23rd day of March 2009:

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Dated at Rockville, Maryland
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NOTICE OF APPEARANCE OF JAMES P. BIGGINS

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter in accordance with 10 C.F.R. § 2.314(b).

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Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 23rd day of March, 2009