

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

Before Administrative Judges:

E. Roy Hawkens, Chairman
Dr. Anthony J. Baratta
Dr. Charles N. Kelber

In the Matter of

SOUTH TEXAS PROJECT NUCLEAR
OPERATING COMPANY, NRG SOUTH
TEXAS 3, LLC, NRG SOUTH TEXAS 4, LLC,
and the CITY OF PUBLIC SERVICE BOARD
acting for the CITY OF SAN ANTONIO, TEXAS

(Combined License Application for South
Texas Project, Units 3 and 4)

Docket Nos. 52-012-COL and
52-013-COL

ASLBP No. 09-883-06-COL-BD01

April 20, 2009

MEMORANDUM AND ORDER
(Affirming Denial of Access to SUNSI)

Petitioners, who are listed infra note 3, are potential parties to this proceeding that involves a combined license application for the South Texas Project Nuclear Power Plant, Units 3 and 4. On March 2, 2009, Petitioners asked the NRC Staff for access to certain information relating to the application that the Applicant had concluded should be withheld as sensitive, unclassified, non-safeguards information (SUNSI).¹ Petitioners asserted that they needed access to the information to enhance their review of the license application and, where such information is relevant, to facilitate their crafting of contentions. On March 12, 2009, the NRC

¹ SUNSI is term coined by the NRC describing a category of information that includes proprietary, confidential commercial, and security-related information. See Procedures to Allow Potential Intervenors to Gain Access to Relevant Records that Contain [SUNSI] or Safeguards Information (SGI) (Feb. 29, 2008) at 1 (ML080380626) [hereinafter Procedures for Access to SUNSI and SGI].

Staff denied Petitioners' request, concluding that they failed to demonstrate a need for access to SUNSI. Petitioners appeal the NRC Staff's denial of their request. We affirm.

BACKGROUND

In early 2008, the Commission amended its regulations to authorize the Secretary of the Commission to issue orders establishing procedures for potential parties² to obtain access to SUNSI and SGI (10 C.F.R. § 2.307(c)). At the same time, the Commission approved procedures for access to SUNSI and SGI to be imposed by the Secretary (Attachment 1 to Procedures for Access to SUNSI and SGI). The Commission approved these procedures after providing an opportunity for public comments. See Response to Public Comments on Proposed Procedures to Allow Potential Intervenors to Gain Access to Relevant Records that Contain [SUNSI] or [SGI] (Feb. 29, 2008) (ML080380633) [hereinafter Response to Public Comments]. This case presents the first opportunity for a Licensing Board to review the NRC Staff's application of these procedures.

The event that triggered the SUNSI request in the instant case was when 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 [hereinafter referred to collectively as Applicant] filed an application with the NRC for combined licenses (COLs) for two nuclear power plants to be located in Matagorda County, Texas. See 74 Fed. Reg. 7934 (Feb. 20, 2009). The NRC Staff published notice of the COL application in the Federal Register (ibid.), and this notice included an order issued by the Secretary of the Commission prescribing procedures regarding, inter alia, how potential parties may request access to SUNSI (id. at

² A "potential party" is any person who intends, or may intend, to participate as a party in the proceeding by demonstrating standing and by filing an admissible contention. See 74 Fed. Reg. 7934, 7936 (Feb. 20, 2009) (citing 10 C.F.R. § 2.309).

7936-38). The Secretary's order consisted of relevant portions of the procedures approved by the Commission.

Pursuant to the order issued by the Secretary, a potential party seeking access to SUNSI is required to file a timely request with the NRC Staff that "must" include the following information (74 Fed. Reg. at 7936):

1. "The name and address of the potential party, and a description of the party's particularized interest that could be harmed by the [licensing] action," and
2. "[T]he requester's need for the information in order to meaningfully participate in this adjudicatory proceeding, particularly why the publicly available versions of the application would not be sufficient to provide the basis and specificity for a proffered contention"

ibid. As relevant here, the NRC Staff will grant access to SUNSI if it determines that: (1) the request demonstrates a reasonable basis to believe a potential party is likely to establish standing to intervene; and (2) the proposed recipient has demonstrated a need for SUNSI (id. at 7937). If the NRC Staff denies access, the potential party may challenge the adverse decision before a presiding officer (ibid.), and a litigant may challenge a presiding officer's adverse decision by seeking Commission review (ibid.) (citing 10 C.F.R. § 2.311).

On March 2, 2009, Petitioners' attorney, Mr. Robert Eye, requested access to SUNSI on behalf of himself and Petitioners. See Letter from Robert Eye to the NRC (Mar. 2, 2009) [hereinafter Petitioners' Request].³ Regarding Petitioners' ability to show a likelihood of

³ The Petitioners are: (1) Karen Hadden, Executive Director of the Sustainable Energy and Economic Development (SEED) Coalition; (2) Eliza Brown, Clean Energy Advocate of the SEED Coalition; (3) Matthew Johnson of the Public Citizen's Texas Office (Public Citizen); (4) Susan Dancer of the South Texas Association for Responsible Energy (STARE), who provided her residential address, which is within 50 miles of the proposed nuclear power plants; and (5) (continued...)

standing, Mr. Eye represented that: (1) Ms. Dancer and Mr. Wagner have standing in their personal capacities by virtue of living within 50 miles of the proposed reactors; (2) Ms. Hadden and Ms. Brown have standing on behalf of the SEED Coalition membership, which includes Ms. Dancer and Mr. Wagner; and (3) Mr. Johnson has standing on behalf of Public Citizen's Texas Office, which allegedly has members within 50 miles of the proposed reactors. See Petitioners' Request at 2.

Regarding Petitioners' need for access to SUNSI, Mr. Eye stated that "Tables 1.3-1 and 1.3-3 estimating the total project costs is one example of necessary information left out of the [E]nvironmental [R]eport. . . . [Ratepayers] have the right to know the expected costs of the project, as they will be affected financially by the project" (Petitioners' Request at 2). Aside from that example, Mr. Eye expressed a broad, non-particularized need for access to SUNSI, stating that "there are literally hundreds of instances in the Environmental Report" where SUNSI was excluded, and "without viewing it, there is no way to determine if the information withheld could have significant bearing on our contentions. We believe our case could be harmed without access to this information" (ibid.).

On March 12, 2009, the NRC Staff denied Petitioners' SUNSI request. See Letter from Mr. James Biggins to Mr. Robert Eye (Mar. 12, 2009) [hereinafter NRC Staff's Denial]. Regarding standing, the NRC Staff concluded that Ms. Dancer and Mr. Wagner demonstrated a reasonable basis to believe they could likely establish personal standing based on their addresses, which reveal they live within 50 miles of the proposed reactors and, thus, are presumed to have standing (id. at 1).⁴

³(...continued)

Bill Wagner, who provided his residential address, which is within 50 miles of the proposed nuclear power plants. See Petitioners' Request at 1-2.

⁴ The NRC Staff found, however, that the other three individuals (Ms. Brown, Ms. (continued...))

But the NRC Staff concluded that Petitioners failed to show they had a legitimate need for access to SUNSI 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’” (NRC Staff’s Denial at 2) (quoting 74 Fed. Reg. at 7936). Regarding Petitioners’ specific request for SUNSI omitted from Tables 1.3-1 and 1.3-3 relating to estimated project costs, the NRC Staff stated:

[Y]ou do not describe why publicly available versions of the Application would not be sufficient to provide the basis and specificity for a proffered contention. Without referencing the publicly available information in the Application and describing the basis for a proffered contention, you have not shown that you need access to the SUNSI information. Your statement that “[a]ccess to this information is critically needed for us to fully review the license application” does not meet the requirements of [74 Fed. Reg. at 7936] to demonstrate a need for the SUNSI information.

NRC Staff’s Denial at 3. Regarding Petitioners’ broad request for other *non-specific* SUNSI that *may* have a bearing on their contentions, the NRC Staff responded that “[t]o the extent that you did not specifically identify any other information to which you were seeking access, your request did not include the necessary information to determine that you have demonstrated a need for SUNSI access” (*ibid.*).

On March 17, 2009, Petitioners appealed the NRC Staff’s denial of their SUNSI request. See Letter from Robert Eye to NRC (Mar. 17, 2009) [hereinafter Petitioners’ Appeal]. On March 23, 2009, the NRC Staff replied to Petitioners’ appeal, stating that Petitioners’ request and appeal “together do not contain enough information to change the NRC Staff’s determination regarding the need for access to SUNSI” (NRC Staff Reply to Petitioners’ Challenge of the NRC Staff Denial of Access to SUNSI (Mar. 23, 2009) at 5 [hereinafter NRC Staff’s Reply]).

⁴(...continued)

Hadden, and Mr. Johnson) failed to provide sufficient information for the NRC Staff to conclude they could likely establish personal standing (NRC Staff’s Denial at 1-2). Nor, stated the NRC Staff, did the SEED Coalition or Public Citizen provide a reasonable basis for the NRC Staff to conclude they could likely establish organizational or representational standing (*id.* at 2).

On March 20, 2009, the Commission referred Petitioners' appeal to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for appropriate action. On March 27, 2009, this Licensing Board was established to preside over Petitioners' appeal.

STANDARD OF REVIEW

In adjudicating Petitioners' appeal from the NRC Staff's denial of Petitioners' request for access to SUNSI, we consider whether the NRC Staff correctly applied the criteria established by the Commission (Appendix 1 to Procedures for Access to SUNSI and SGI) and prescribed by order of the Secretary of the Commission (74 Fed. Reg. at 7936-37) – namely, (1) whether the SUNSI request demonstrates “a reasonable basis to believe that a potential party is likely to establish standing to intervene” (74 Fed. Reg. at 7937); and (2) whether the SUNSI request demonstrates the proposed recipient has a “need” for the SUNSI (*ibid.*). Our conclusion that we apply these criteria is based on the language and structural implication of the procedures. Pursuant to the procedures, if a SUNSI request is denied, the NRC Staff shall “briefly state the reasons for the denial” (*ibid.*). The requester then may “challenge the NRC Staff's adverse determination with respect to access to SUNSI . . . by filing a challenge . . . with [the presiding officer]” (*ibid.*), and the NRC Staff may file a reply to the requester's challenge (*id.* at 7938). Thus, when the appeal appears before us, we are asked to adjudicate a dispute arising from – as relevant here – the NRC Staff's adverse determinations regarding likelihood of standing and need. These are the criteria the Commission has directed are relevant to determining whether a potential party should be granted access to SUNSI, these are the criteria the litigants have briefed in their written submissions, and we thus conclude that these are the criteria that we should consider on appeal. See Response to Public Comments at 4 (the Secretary's order

mandating the procedures for access to SUNSI “will serve to emphasize and make clear that the presiding officer . . . and the potential parties will be legally bound by the procedures”).⁵

Our standard of review here is de novo.

ANALYSIS

Before the NRC Staff will grant a potential party’s request for access to SUNSI, two criteria must be satisfied: (1) the request must demonstrate “a reasonable basis to believe that a potential party is likely to establish standing to intervene” (74 Fed. Reg. at 7937); and (2) the request must demonstrate the proposed recipient has a “need” for the SUNSI (ibid.). Here, the NRC Staff found that the request demonstrated a reasonable basis to believe that Ms. Dancer and Mr. Wagner could likely establish personal standing and thus satisfy the first criterion (the “likelihood of standing” criterion). But the NRC Staff concluded that the request failed to show that Petitioners had a “need” for the SUNSI. The NRC Staff thus denied the request.

We agree with the NRC Staff that Petitioners’ request failed to satisfy the second criterion – the “need” criterion – for gaining access to SUNSI. Although our analysis could

⁵ Although the procedures state that “[i]f challenges to the NRC Staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information” (74 Fed. Reg. at 7937), we do not construe this sentence as requiring us to ignore the SUNSI-access criteria endorsed by the Commission and briefed by the litigants on appeal. Rather, we understand this sentence as recognizing that once a challenge is filed, access determinations will be made by a presiding officer, who – guided by the SUNSI-access procedures ordered by the Secretary of the Commission – will adjudicate the issues presented by the parties, with the availability thereafter of Commission review under 10 C.F.R. § 2.311. See Response to Public Comments at 2 (the SUNSI-access “procedures developed by the Commission will be applicable to persons who have requested or who may request to participate in NRC adjudications conducted under 10 C.F.R. Part 2, Subparts G, K, or L, and who, in connection with a particular proceeding, seek to gain access to such information”).

The scope of our review in the instant case does not extend to whether the information sought by the requesters is properly characterized as SUNSI. Cf. 10 C.F.R. § 2.390 (procedures governing NRC Staff’s decisions to withhold information from public disclosure); 10 C.F.R. Part 9 Subpart A (procedures for obtaining information from the NRC Staff under the Freedom of Information Act). Rather, our review here is limited to considering and resolving Petitioners’ appeal of the NRC Staff’s denial of their request for access to SUNSI. See 74 Fed. Reg. at 7937.

properly be limited to a discussion of the need criterion, we will briefly address Petitioners' argument relating to the likelihood of standing criterion.

1. The Likelihood of Standing Criterion

At the outset, we observe that Petitioners had no difficulty demonstrating a reasonable basis to believe that Ms. Dancer and Mr. Wagner could likely establish personal standing. They did so by providing their residential addresses and representing that these addresses were within 50 miles of the proposed reactors. See Petitioners' Request at 2.

But contrary to Petitioners' argument (Petitioners' Appeal at 2), the NRC Staff did not err in determining that Petitioners failed to provide a reasonable basis for concluding that the SEED Coalition and Public Citizen could likely establish standing. To satisfy this criterion, Petitioners were required to provide sufficient information to allow the NRC Staff to conclude that the requirements for "representational standing" or "organizational standing" could likely be satisfied. This they failed to do. As the NRC Staff explained:

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.

NRC Staff's Reply at 3.⁶

We emphasize that the standard for satisfying the likelihood of standing criterion in this context is neither steep nor onerous. The Commissioners have confirmed that filing a request for SUNSI entails "relatively minimal effort" (Detroit Edison Co., (Fermi Unit 3), CLI-09-04, 69

⁶ Commission precedents describing the requirements for establishing representational and organizational standing are longstanding and legion. See, e.g., Consumers Energy Co. (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409-11 (2007); Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999); Georgia Inst. of Tech. (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115-17 (1995).

NRC ___, ___ (slip op. at 5) (Feb. 17, 2009)). Thus, SUNSI requests need not be accompanied by affidavits or include lengthy, detailed justifications addressing the likelihood of standing criterion. Rather, such requests need simply include the “name and address of the potential party and a description of the potential party’s particularized interest that could be harmed by the [proposed licensing] action” (74 Fed. Reg. at 7936) sufficient to demonstrate a reasonable basis to conclude he or she could likely establish standing (*id.* at 7937) .⁷

2. The Need for SUNSI Criterion

Petitioners also contend the NRC Staff erred in determining that Petitioners failed to provide sufficient information to demonstrate a legitimate need for SUNSI. See Petitioners’ Appeal at 2-3. For the reasons explained by the NRC Staff, we disagree. See NRC Staff’s Reply at 3-5; NRC Staff’s Denial at 2-3.

In Petitioners’ March 2 request for SUNSI, the only specific example of SUNSI they stated they needed related to “total project costs” (Petitioners’ Request at 2), and they expressed their alleged need as follows:

Tables 1.3-1 and 1.3-3 estimating the total project costs is one example of necessary information left out of the environmental report. If ratepayers in at least one municipal utility market have the costs of nuclear power from [the

⁷ In their request for SUNSI, Petitioners did not specify whether the SEED Coalition and Public Citizen sought representational standing or organizational standing. See Petitioners’ Request at 2. The NRC Staff therefore analyzed the likelihood of standing criterion under both theories, and it explained why Petitioners failed to satisfy either theory. See NRC Staff’s Denial at 2. Moreover, “[t]o avoid the concern that an individual cannot have multiple organizations represent his or her interests in a hearing, the Staff assume[d] for 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” (NRC Staff’s Reply at 3 n.1). Thus, the NRC Staff’s approach in analyzing whether Petitioners satisfied the likelihood of standing criterion was – quite appropriately – not unduly rigid or stringent.

We observe that when future potential parties request access to SUNSI, it may behoove them – and also facilitate the NRC Staff’s review process – if they specify the theory under which they seek to satisfy the standing criterion, and briefly stated why they could likely satisfy *each requirement* of that theory.

Applicant] 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.

Ibid. Although the SUNSI-access procedures do not impose a high threshold for demonstrating need, they must be applied consistent with the principle that it is “important to prevent . . . unnecessary disclosure of sensitive information” (Procedures for Access to SUNSI and SGI at 4). In this case, Petitioners’ cursory description of their alleged need for SUNSI relating to project costs focused solely on the ratepayers “right to know the expected costs of the project” (Petitioners’ Request at 2). But the asserted “right to know” such costs, standing alone, is not a proper subject for a contention under our rules; rather, the state regulatory authority charged with regulating the electric utilities and protecting the rate payer may be the proper venue for asserting this right. Had Petitioners offered a reason for needing such information material to the findings a Licensing Board must make⁸ and otherwise explained “why publicly available versions of the application would not be sufficient to provide the basis and specificity for a proffered contention” (74 Fed. Reg. at 7936), they would have satisfied the need criterion.

We stress that the requirement to discuss the “basis . . . for a proffered contention” (74 Fed. Reg. at 7936) is not to be equated with the discussion that would be necessary to support an admissible contention. Rather, the discussion need only show why the publicly available information in the application is not sufficient to support the basis and specificity of a proffered contention. In the instant case, Petitioners failed even to suggest the basis of a proffered contention. They simply asserted that they needed information relating to costs because ratepayers had a “right to know the expected costs of the project” (Petitioners’ Request at 2). This falls far short of satisfying the need criterion.

⁸ Cf. Tennessee Valley Authority (Bellefonte Nuclear Power Plants Units 3 and 4), LBP-08-16, 68 NRC __, __-__ (Sept. 12, 2008) (slip op. at 66-69) (Licensing Board admits a National Environmental Policy Act-related contention regarding the adequacy of the overall cost figures as they relate to the cost component of the alternatives analysis relative to combined renewable/fossil-fuel baseload generation sources).

Petitioners' broad and speculative assertion that their "case could be harmed" if they were denied access to "literally hundreds of instances in the Environmental Report where information was not included for proprietary reasons" (Petitioners' Request at 2) was likewise inadequate to demonstrate a legitimate need for access to SUNSI. In particular, Petitioners' expansive assertion was fatally deficient because it: (1) failed to identify the SUNSI to which they sought access; and (2) failed to explain at all why publicly available versions of the application were insufficient to provide the basis and specificity for a proffered contention. See 74 Fed. Reg. at 7936.

We recognize that a petitioner's lack of access to SUNSI may, on occasion, hinder it to some degree in its ability to demonstrate "why publicly available versions of the application would not be sufficient to provide the basis and specificity for a proffered contention" (74 Fed. Reg. at 7937). Any such hindrance, however, does not absolve a petitioner from at least endeavoring to address this criterion. A contrary conclusion would improperly convert the current SUNSI disclosure process from one that is based on a petitioner's ability to show "legitimate need" (ibid.) into one where a petitioner's broad, non-specific, and speculative assertion of "need" would mandate the wholesale release of SUNSI. Such an outcome would not only be in derogation of the current procedural regime, it would have the perverse effect of conferring more expansive rights on potential parties regarding access to SUNSI than on actual parties.

Finally, in their appeal challenging the NRC Staff's denial of their SUNSI request, Petitioners mention several additional "topics of SUNSI information" that allegedly should be released (Petitioners' Appeal at 3). But Petitioners' broad request for access to topical SUNSI is fatally deficient. The procedure for seeking access to SUNSI does not provide a method for general access to SUNSI or topical access to SUNSI. 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 (74 Fed. Reg. at 7936-37). Petitioners' assertion that access to topical SUNSI is necessary "to fully understand and effectively research the many issues of concern that we have identified" (Petitioners' Appeal at 3) is simply inadequate to demonstrate a legitimate need for access to SUNSI under the governing procedures.

CONCLUSION

For the foregoing reasons, we affirm the NRC Staff's denial of Petitioners' request for access to SUNSI.

Pursuant to 10 C.F.R. § 2.311, a litigant wishing to appeal this decision to the Commission must do so within ten days after the service of this Order.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD⁹

/RA/

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE *

/RA/

Dr. Charles N. Kelber
ADMINISTRATIVE JUDGE

* Judge Baratta has filed an Additional Comment.

Rockville, Maryland
April 20, 2009

⁹ Copies of this Memorandum and Order were sent this date by Internet e-mail to counsel for (1) Petitioners, and (2) the NRC Staff.

Additional Comment of Administrative Judge Anthony J Baratta

I fully concur with the analysis and outcome in this case. I provide this additional comment to express my view that because this is the first challenge to a Staff denial of access to SUNSI information under these new procedures, should these Petitioners file a petition to intervene and be admitted, they should be granted an opportunity – should they wish one – to file a second request for access to SUNSI. If they file such a request, and if are successful, it would seem to me that the newness of the procedures and lack of experience in its application would be good cause to allow the filing of a new or amended contention in this procedure, consistent with the requirements in 10 C.F.R. §§ 2.309 and 2.302.f(2).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
SOUTH TEXAS PROJECT NUCLEAR) Docket Nos. 52-012-COL and 52-013-COL
OPERATING COMPANY)
)
(South Texas Project Units 3 and 4))
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (AFFIRMING DENIAL OF ACCESS TO SUNSI) (LBP-09-05) have been served upon the following persons by the Electronic Information Exchange.

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Docket Nos. 52-012-COL and 52-013-COL
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[Original signed by Nancy Greathead
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Dated at Rockville, Maryland
This 20th day April 2009