

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
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)
LUMINANT GENERATION CO. LLC) Docket Nos. 52-034 & 52-035
)
)
(Comanche Peak Nuclear Power Plant,)
Units 3 & 4))

PARTIES' JOINT BRIEF ON HANDLING SUNSI IN BOARD ORDERS AND ORAL ARGUMENT

INTRODUCTION

Pursuant to the Board's Order of August 7, 2009,¹ the U.S. Nuclear Regulatory Commission ("Commission" or "NRC") staff (Staff); the SEED Coalition, Public Citizen, True Cost of Nukes, and Mr. Lon Burnam (collectively "Intervenors"); and Luminant Generation Company, LLC (Applicant), hereby file their joint brief addressing how the Licensing Board should treat sensitive unclassified non-safeguards information (SUNSI) in orders, memoranda, oral arguments, hearings, transcripts, and other contexts that may arise in this proceeding.

As discussed below, the parties agree that several authorities govern the Atomic Safety and Licensing Board's (Board) treatment of SUNSI in this proceeding. Counsel for the Applicant and the Intervenors have authorized counsel for the NRC Staff to submit this brief on their behalf. If any contentions are admitted which necessitate the use of SUNSI in orders or at

¹ *Luminant Generation Company, LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), ML092190362 (Aug. 7, 2009) (slip op.) (unpublished order)(Order Regarding Briefing on Handling SUNSI in Board Orders and Oral Argument).

hearing, then the Board may issue oral rulings or issue orders as necessary, including amending the Protective Order.²

BACKGROUND

On April 6, 2009, the Intervenors submitted a petition to intervene in the Comanche Peak Units 3 and 4 (Comanche Peak) combined license (COL) proceeding.³ The Intervenors' Contention 7 alleged that the COL application omitted information required by 10 C.F.R. § 52.80(d), pursuant to the Power Reactor Security Requirements rule, 74 Fed. Reg. 13,926 (Mar. 27, 2009). On August 6, 2009, the Board granted the admissibility of Contentions 13 and 18, postponed ruling on the admissibility of Contention 7, and granted the Intervenors' request for a hearing. *Luminant Generation Company, LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), LBP-09-17, 69 NRC __ (Aug. 6, 2009) (slip op.).

On May 26, 2009, the Applicant filed a "Mitigative Strategies Report" addressing the requirements of 10 C.F.R. § 52.80(d)⁴ The Mitigative Strategies Report contains security related information classified as SUNSI. Because the Intervenors were granted access to the Mitigative Strategies Report, the Board issued the Protective Order governing disclosure of the information. The Protective Order also granted the Intervenors leave to file new contentions based on the contents of the Mitigative Strategies Report. Protective Order at 4. The

² *Luminant Generation Company, LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), ML091820781 (July 1, 2009) (slip op.) (unpublished order) (Memorandum and Order: Protective Order Governing the Disclosure of Protected Information) ("Protective Order").

³ The Staff and Applicant submitted timely answers to the petition on May 1, 2009. The Petitioners timely replied on May 8, 2009.

⁴ Letter from Steven P. Frantz, Morgan, Lewis & Bockius, to Licensing Board, Notification of Filing Related to Proposed Contention 7 (May 26, 2009) (ML091460830).

Intervenors filed proposed contentions regarding the Mitigative Strategies Report on August 10, 2009.

Because of the possibility that in orders ruling on the issues addressed in preceding filings, the Board may have to refer to SUNSI, and that in any oral argument held on SUNSI contentions, SUNSI may arise, the Board directed the parties to brief the law, including statutes, rules and/or caselaw, that apply to the following issues:

- (1) How the Licensing Board should treat any SUNSI in any Memoranda or Orders it may issue;
- (2) How SUNSI should be handled in any proceedings such as oral argument or a hearing;
- (3) How SUNSI should be treated in any transcripts of hearings; and
- (4) How SUNSI should be handled in any other contexts that may arise in this proceeding.⁵

DISCUSSION

The Board has broad authority to conduct the proceeding before it. See Power of the Presiding Officer, 10 C.F.R. § 2.319. The Commission's rules also provide authority for a presiding officer in a proceeding to withhold SUNSI from public inspection. 10 C.F.R. § 2.390(b)(6). Additional details on handling SUNSI are contained in Policy Issue SECY-04-0191 "Withholding Sensitive Unclassified Information Concerning Nuclear Power Reactors from Public Disclosure" (Oct. 19, 2004)("SECY-04-0191").⁶

NRC regulations "provide a mechanism to withhold from public disclosure information related to the physical protection of nuclear power plants that does not meet the existing criteria

⁵ *Luminant Generation Company, LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), ML092190362 (Aug. 7, 2009) (slip op. at 1) (unpublished order).

⁶ <http://www.nrc.gov/reading-rm/doc-collections/commission/secys/2004/secy2004-0191/2004-0191scy.pdf>

for designation as SGI [safeguards information].” SECY-04-0191 at 6-7 (citing 10 C.F.R. § 2.390). Historically, when this type of information was submitted to the NRC by a licensee, it was withheld from public disclosure and handled similarly to commercial or financial information as allowed by 10 C.F.R. § 2.390(a)(4). *Id.* Since September 11, 2001, the NRC has expanded the application of this regulation to address SUNSI previously made public but now withheld if the information could be useful to a potential adversary, such as detailed layout drawings, selected inspection reports, and other such information. *Id.*

Because the public has the right to participate in varying ways in the licensing and other regulatory processes associated with NRC-licensed facilities, withholding these types of sensitive but unclassified non-safeguards information about power reactors raises issues in adjudications, particularly concerning the proper treatment of this type of information in “hearing files, testimony, documents which must be provided in discovery, and documents supporting staff conclusions and licensing actions.” *Id.* at 7. The NRC recognizes that the withholding of certain information in staff documents related to those processes may need to be modified on a case-by-case basis, such that certain information may not be able to be withheld at all under applicable statutory and case law, while other information may have to be provided to parties to proceedings under protective orders. *Id.* In the Staff Requirements Memorandum issued in response to SECY-04-0191 (SRM SECY-04-0191), the Commission directed the staff to follow the guidance in SECY-04-0191 to determine which information is sensitive, and, in developing NRC's criteria for sensitive information, to strive for consistency in protecting this information.⁷

The Staff follows the “NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information” established on October 26, 2005 (ML052990146)

⁷ <http://www.nrc.gov/reading-rm/doc-collections/commission/srm/2004/2004-0191srm.pdf>

("SUNSI Policy Statement"), which provides details about properly controlling SUNSI.⁸ As the SUNSI Policy Statement is generally applicable to NRC employees, it may assist the Board in instructing the parties in the handling, marking, and protection of SUNSI for a hearing.

1. How the Licensing Board Should Treat Any SUNSI in Any Memoranda or Orders It May Issue

The Licensing Board can issue separate rulings in order to separate issues concerning SUNSI from non-SUNSI related issues, and thereby only withhold from the public the information requiring protection. Under 10 C.F.R. § 2.390, the Licensing Board may withhold from public disclosure information related to the physical protection of nuclear power plants that does not meet the existing criteria for designation as safeguards information. See SECY-04-0191 at 6 (citing 10 C.F.R. § 2.390); Power Authority of the State of New York (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-16, 54 NRC 1, 1-2 (2001). The Licensing Board can issue a protective order setting forth the terms and conditions under which access will be granted to that portion of its ruling that must be withheld from the public, in order to prevent unauthorized or inadvertent disclosure of SUNSI by each individual who will be granted access to SUNSI. 10 C.F.R. § 2.390; "Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation" 74 Fed. Reg. 6179, 6180 (Feb. 5, 2009).

⁸ The Commission provided detailed directions about the implementation of revised SUNSI handling procedures, as well as the development of a new two tiered system still being developed, when the Commission voted to disapprove the policy revisions. See COMSECY-05-0054 (June 29, 2006) (<http://www.nrc.gov/reading-rm/doc-collections/commission/comm-secy/2005/>). The SUNSI Policy Statement was intended to supersede Management Directive 12.6 (ML041700603).

2. How SUNSI Should Be Handled in Any Proceedings Such as Oral Argument or a Hearing

This Board has the authority to take any statements or testimony in camera or under other suitable conditions as the Board may establish and keep the record of that portion of the hearing or conference and any transcript thereof withheld from distribution to the public.

10 C.F.R. § 2.390(b)(6). See also *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1214-15 (1985). NRC personnel⁹ who arrange or participate in hearings, conferences or discussions involving sensitive unclassified information must ensure before the hearing, conference or discussion that all personnel participating in the proceeding are identified and authorized to have access to the information that is to be discussed. SUNSI Policy Statement at 5. Before conducting a hearing, conference, or discussion involving SUNSI, the Licensing Board should ensure that all of the individuals participating are authorized to have access to the SUNSI to be discussed, and the Licensing Board should indicate to the participating individuals that the specific data they will furnish is SUNSI, and advise them of the category of the information (security related information), together with any protective measures required. *Id.* The Licensing Board should also ensure that no discussion takes place that is audible to persons not authorized to have access to the information. *Id.* The Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene in this matter, published February 5, 2009, sets forth the Secretary's Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation,¹⁰ which

⁹ Certain procedures also apply to holders of operating licenses. See NRC Regulatory Issue Summary 2005-26 (<http://www.nrc.gov/reading-rm/doc-collections/gen-comm/reg-issues/2005/ri200526.pdf>).

¹⁰ 10 C.F.R. § 2.307(c) provides the Secretary of the Commission the authority to issue orders governing the procedures to access SUNSI to intervene in a hearing.

applies to anyone who seeks access to SUNSI to participate in this proceeding. 74 Fed. Reg. 6177, 6179-80 (Feb. 5, 2009).

The Protective Order issued by this Board on July 1, 2009, which was agreed to by the parties and submitted jointly, reserves the Board's right to alter or amend the Protective Order, as well as to issue additional orders concerning the use of Protected Information at a hearing. Protective Order at 3-4. In order to ensure that no unauthorized person receives SUNSI, it is within the authority of this Board to require that, at any conference or hearing in this proceeding in which a statement is or will be made by a party, representative of a party, or witness, that the presenting party notify the Board that such testimony or statement will contain sensitive unclassified information prior to the testimony being made. The parties are already under the obligation to prevent the disclosure of SUNSI to unauthorized persons.

3. How SUNSI Should be Treated in Any Transcripts of Hearings

This Board has the authority to take any such statement or testimony in camera or under other suitable conditions as the Board may establish, and keep the record of that portion of the hearing or conference and any transcript thereof, withheld from distribution to the public. 10 C.F.R. § 2.390(b)(6). The Commission has determined that portions of transcripts of prehearing conferences and hearings may be subject to withholding from the public under 10 C.F.R. § 2.390. See *Areva Enrichment Services, LLC* (Eagle Rock Enrichment Facility), CLI-09-15, 69 NRC ____ (July 23, 2009) (slip op. at 4-5).¹¹

¹¹ <http://www.nrc.gov/reading-rm/doc-collections/commission/orders/2009/2009-15cli.pdf>

4. How SUNSI Should Be Handled in Any Other Contexts That May Arise in This Proceeding

Issues related to the withholding of SUNSI may arise in the context of the hearing file, testimony, documents that must be provided in discovery, and documents that support NRC Staff conclusions and licensing actions. SECY-04-0191 at 6. The parties will file pleadings or other documents containing SUNSI using the E-Filing system, and submit them according to the procedures for non-public filings.¹² The Protective Order requires that if “any party to a proceeding on this Application intends to submit an exhibit, testimony, or pleading containing Protected Information without using the E-Filing system, the party shall notify the Licensing Board prior to such filing.” Protective Order at 4. Such notification will allow the Board to direct the party to follow procedures necessary to avoid public disclosure of SUNSI.

The Commission has determined that the NRC should rely on as much public information as is practicable and make public as much of its analysis as is feasible, but the Commission has also recognized that it may prove necessary for the NRC to withhold some facts underlying the NRC Staff’s findings and conclusions as safeguards information, classified information, classified restricted data, national security information, or SUNSI. *See Eagle Rock*, CLI-09-15, 69 NRC at ___ (slip op. at 4). The Commission has recognized that there may be situations in which correspondence between the NRC and the Applicant, and/or portions of the NRC Staff’s safety evaluation report and environmental impact statement may be subject to withholding from public inspection in accordance with 10 C.F.R. § 2.390 and, in those circumstances, would not be placed in the Public Document Room or the ADAMS Publicly

¹² The Staff and the Applicant have the ability to review their filings and determine whether they contain SUNSI and therefore require non-public filing. The Staff and the Applicant will review their filings to ensure that each filing is made publicly available if the filing does not contain SUNSI information.

Available Records System. *Id.* It is within the Board's authority to direct the conduct of the proceedings or issue a supplemental protective order as necessary to protect SUNSI information from public disclosure. The parties recognize that they each, individually, are responsible for protecting SUNSI information within their control and will strive to coordinate their actions in this proceeding to minimize the burden on the Board from handling SUNSI information.

CONCLUSION

The Board may direct the conduct of this proceeding including the conduct of a hearing and issue protective orders, or alter or amend the existing Protective Order, to comply with the Commission's requirements for protecting SUNSI from public disclosure. If the Board must refer to SUNSI or if the Board admits a SUNSI contention for hearing, the parties understand that the Board will direct the conduct of the hearing or a portion of the hearing according to the requirements necessary to avoid disclosure of SUNSI to any unauthorized person.

Respectfully submitted,

/Signed (electronically) by/

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Executed in Accord with 10 C.F.R. § 2.304(d)

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Parties' Joint Brief on Handling SUNSI in Board Orders and Oral Argument" has been served on the following persons by Electronic Information Exchange on this 27th day of August, 2009:

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