

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
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)  
STP NUCLEAR OPERATING COMPANY ) Docket Nos. 52-012 & 52-013  
)  
)  
(South Texas Project, Units 3 & 4) )

NRC STAFF'S ANSWER IN OPPOSITION TO INTERVENORS' MOTION  
FOR ORDER THAT ARGUMENTS / HEARINGS BE CONDUCTED IN PUBLIC

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the U.S. Nuclear Regulatory Commission staff (Staff) hereby answers in opposition to the “Motion For Order That Arguments/Hearings Related To The Fires And Explosions Contentions That Address Factual And Legal Arguments Related Thereto And NEI 06-12 Be Conducted In Public Pursuant To 10 C.F.R. § 2.328” (“Intervenors’ Motion”) filed November 2, 2009, by the Intervenors in the above referenced proceeding.

BACKGROUND

On November 2, 2009, the SEED Coalition, Public Citizen, True Cost of Nukes, and Mr. Lon Burnam (collectively “Intervenors”) filed a motion in the above referenced proceeding seeking to have “the oral arguments and all other hearings in this Docket related to the fires and explosions regulations (10 C.F.R. § 50.54(hh)(2)) be conducted in public.” Intervenors’ Motion at 1. According to Intervenors’ Motion, the contents of certain pleadings should be subject to public argument and hearing and made available in the NRC’s Public Document Room and online in the Agencywide Documents Access and Management System. *Id.* at 1-2.<sup>1</sup> Intervenors

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<sup>1</sup> Staff does not contend that all pleadings or all matters to be discussed at the hearing are SUNSI. Staff concurs that, as identified in Intervenors’ Motion, documents 2, 3, and 4 contain no SUNSI and could be released to the public - if the Board so orders. Had Intervenors engaged in sincere efforts to resolve the matters raised in the motion some of the questions would have been resolved subject to Board approval. Staff notes, the parties are not free to ignore the Board’s protective order.

reasoned that the vast majority of NEI 06-12 is required to be the subject of public hearing under 10 C.F.R. § 2.328 because it is neither security related nor otherwise subject to non-disclosure under 10 C.F.R. § 2.390. Similarly, Intervenor's contend that the other pleadings listed in Intervenor's Motion should be made public and released.<sup>2</sup>

For the reasons set forth below, Intervenor's Motion should be denied. In the alternative, any proposed order to release the documents at issue or conduct a public hearing should be stayed.

### DISCUSSION

#### A. Intervenor's Motion is Untimely and Should be Denied

NRC staff opposes Intervenor's Motion as the filing is untimely pursuant to Commission rules. On July 1, 2009, the Atomic Safety and Licensing Board ("Board") issued an order on the proper treatment and handling of Sensitive Unclassified Non-Safeguards Information ("SUNSI"). See *STP Nuclear Operating Company* (South Texas Project, Units 3 & 4) ML091820419 (July 1, 2009) (slip op.) (unpublished order) (Memorandum and Order: Protective Order Governing the Disclosure of Protected Information) ("Protective Order"). Specifically, on October 14, 2009, the Board notified the parties in this proceeding that significant portions of the upcoming oral argument and hearing *may* be closed to the public.

Commission rules, at 10 C.F.R. § 2.323, require that "[a] motion must be made no later than ten days after the occurrence or circumstance from which the motion arises." Intervenor's Motion was not filed in compliance with 10 C.F.R. § 2.323 as it was not within ten days of the October 14, 2009 order. Accordingly, Intervenor's Motion should be denied.

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<sup>2</sup> Staff notes that Intervenor's contacted Staff via email seeking Staff's position but did not mention that Intervenor's also sought the public release of other previously filed pleadings in this proceeding. Staff contends that the email contact, as it did not reflect the actual motion, did not, and does not satisfy the 10 C.F.R. § 2.323(b) sincere effort requirement. Had Intervenor's used sincere efforts to communicate with Staff some of the issues may have been resolved.

B. Intervenors' Motion Seeks to Disclose SUNSI

With respect to the upcoming oral arguments on contention admissibility, Staff contends that, consistent with Board practices, a post hearing review of transcripts for redaction presents the best method to prevent unintentional disclosures of SUNSI. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-05-29, 62 NRC 635, 640 (2005) (“when disputes have arisen as to the extent of disclosure of material claimed to be protected, all previous boards have done as we would have done here, that is, stayed, on the Board's own volition, the actual release of any contested document pending Commission review of any Board ruling that *rejects* a withholding claim. Requests for extraordinary remedies would not, then, be expected to be required in order for a party to protect its interest in nondisclosure.”) Staff contends that such an approach is consistent with SECY 04-0191 wherein security-related SUNSI handling requirements were established. See SECY 04-0191, Withholding Sensitive Unclassified Information Concerning Nuclear Power Reactors From Public Disclosure (October 19, 2004), ML042310663.

Intervenors' Motion asserts that the “public interest” is best served and balanced by an open hearing. Intervenors' Motion at 4-5. In considering the proper standard for the release of potentially safeguards information, the Commission, in a 2005 decision provided the following guidance:

“[W]e remind our licensing boards that section 147 of the Atomic Energy Act gives NRC authority over protecting safeguards information from unauthorized disclosure. The protection of safeguards information, where warranted, is absolute; there is no balancing of the government's duty to protect safeguards information against the public interest in disclosure.”

See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-22, 62 NRC 542, 544 (October 19, 2005). While the Commission's decision referenced safeguards information and not SUNSI, the decision is equally applicable to security-related SUNSI. The decision established that there was no balancing test to be applied when considering

withholding information from disclosure. Consistent with the Commission's decision, Staff contends that SUNSI should be afforded the same protection from disclosure without application of a balancing test. Intervenor's request to open the November 12, 2009 hearing based on a balancing of interests should - consistent with the Commission's decision - be denied. See e.g. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-16, 62 NRC 1 (2005); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-08, 61 NRC 129 (2005); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-01, 61 NRC 160 (2005); see also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-05-29, 62 NRC 635, at 640 (October 28, 2005). Thereafter, if the Board so elects, the Board may order that the hearing transcripts and documents at issue be reviewed for SUNSI and redacted, if necessary, and then made public. In the alternative, consistent with Board practices, any proposed order to release the documents at issue or conduct a public hearing at this time should be stayed pending Commission review. See, *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-05-29, 62 NRC 635, at 640 (October 28, 2005).

#### CONCLUSION

For the reasons set forth above Intervenor's Motion should be denied. In the alternative, any proposed order to release the documents at issue or conduct a public hearing should be stayed.

#### CONSULTATION

Pursuant to the October 20, 2009 Initial Scheduling Order, I certify that I have made a sincere effort to make myself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that my efforts to resolve the issues have been unsuccessful. On November 2 at approximately 11:00am NRC Staff Counsel Michael Spencer received an email from Bob Eye stating that he intended to file a motion to require the argument/ hearing to be conducted in public related to the contentions on large area fires and

explosions. That same day at approximately 5:00 p.m. NRC Staff Counsel Sara Kirkwood responded via email stating that the Staff would oppose the proposed motion because the need to protect sensitive security information may require that part or all of the November 13 oral argument be closed to the public. Further, the Board order of Oct. 14, 2009 stated that significant portions of the argument would be closed to the public. Thus, the Staff would oppose the proposed motion as untimely under 10 C.F.R. § 2.323, which provides that "[a] motion must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises." Thus, the efforts to resolve the issues raised in the consultation were unsuccessful. As previously discussed in this response, the Staff was not aware that the intervenor was seeking release of documents, until the motion was filed. If the Staff had been consulted regarding the release of documents, we might have been able to resolve part of the motion.

**/Signed (electronically) by/**

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

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Dated Rockville, Maryland  
This 10<sup>th</sup> day of November, 2009

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NOTICE OF APPEARANCE OF ANTHONY WILSON

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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Dated at Rockville, Maryland  
this 10th day of November, 2009

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC Staff's Answer In Opposition To Intervenors' Motion For Order That Arguments / Hearings Be Conducted In Public" and "Notice of Appearance of Anthony Wilson" have been served upon the following persons by Electronic Information Exchange this 10th day of November, 2009

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