

November 16, 2009

Mr. Robert Eye, Esq.
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(Via E-mail: bob@kauffmaneye.com)

RE: November 5, 2009, Request for Sensitive Unclassified Non-Safeguards Information
November 5, 2009, Amended Request for Sensitive Unclassified Non-Safeguards Information
November 9, 2009, Amended Request for Sensitive Unclassified Non-Safeguards Information
Luminant Generation Co., L.L.C. (Comanche Peak Nuclear Power Plants, Units 3 and 4, Combined License Application), Dockets 52-034 and 52-035

Dear Mr. Eye:

The U.S. Nuclear Regulatory Commission Staff (NRC Staff) is responding to your and your clients' requests for access to Sensitive Unclassified Non-Safeguards Information (SUNSI) contained in a Draft Interim Staff Guidance (ISG) referenced on the NRC's public website on October 13, 2009 (DC/COL-ISG-016) (ML093140154), and your amended requests to clarify the title of the document you seek access to (ML093140433) and to add Dr. Edwin Lyman, Ph.D., to the list of individuals who seek access to this information (ML093140199). For the reasons stated below, the NRC Staff has determined that your request, the requests by Ms. Hadden and Ms. Brown, both of the SEED Coalition, and your request on behalf of Dr. Edwin Lyman, Ph.D., for access to DC/COL-ISG-016, are denied.

In your request dated November 5, 2009, you and your clients request access to DC/COL-ISG-016, which the NRC Staff has designated as SUNSI because it contains security related information, "for meaningful participation in the adjudicatory proceeding because it clarifies or addresses issues not discussed in the Standard Review Plan governing compliance with 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2)." You reason that because the Applicant asserts that its Mitigative Strategies Report complies with NEI 06-12, Revision 2, which you argue the Commission has only approved for operating reactors and not for new reactor applications, and DC/COL-ISG-016 "is intended to clarify or address issues not discussed in the Standard Review Plan by providing guidance on compliance with 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2) for new reactor submittals[,]" you "cannot meaningfully analyze applicants' claims" without access to DC/COL-ISG-016. You specifically request access for "Karen Hadden, SEED Coalition; Eliza Brown, SEED Coalition; and Robert Eye." By your amended SUNSI request, submitted November 5, 2009, you also request that Dr. Edwin Lyman, Ph.D., be added to the list of individuals who need access to DC/COL-ISG-016.

Pursuant to the “Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation,” the NRC Staff evaluated your request to determine whether (1) there is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding, and (2) there is a legitimate need for access to SUNSI. Luminant Generation Company, LLC; Application for the Comanche Peak Nuclear Power Plant Units 3 and 4; Notice of Order, Hearing, and Opportunity To Petition for Leave To Intervene, 74 Fed. Reg. 6177, 6179 (February 5, 2009) (“SUNSI/SGI Order”). While the Intervenor identified in your request have already been found to have standing and have been admitted as parties to this proceeding, the NRC Staff has determined that you have provided an insufficient basis for the Staff to determine at this time that the Intervenor identified in your request have demonstrated a legitimate need for access to DC/COL-ISG-016.

Need for SUNSI

In your letter, you argue that “[t]he standard for access to ISG-16, the purpose of which is, by definition, to *correct* *unclear and incomplete* guidance, should be identical to the standard by which Intervenor were granted access to the underlying (yet unclear and incomplete) SUNSI guidance document.” The requirements for obtaining access to SUNSI information have been determined by the Commission and set forth in the SUNSI/SGI Order issued by the Commission in this proceeding. 74 Fed. Reg. at 6179. This order 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.” Your request specifically identifies DC/COL-ISG-016 as necessary information, and you assert that you cannot determine whether the Applicant’s Mitigative Strategies Report is consistent with an “anticipated ISG.”

With regard to your current contentions, you have not explained why DC/COL-ISG-016, a draft guidance document, would be needed for the Intervenor to meaningfully participate in the adjudicatory proceeding, particularly why it is necessary to provide the basis and specificity for the current contentions, which have already been formulated and submitted. The Intervenor sought and were granted access to the Applicant’s Mitigative Strategies Report and NEI 06-12, Revision 2, upon which Intervenor have already formulated five contentions, which were submitted August 10, 2009, almost two months before the draft guidance document was issued for comment. You have not demonstrated why the publicly available versions of the application and the nonpublic information that you have already been given access to are not sufficient to form the basis and specificity for your already proffered contentions.

Regarding your request for access to DC/COL-ISG-016 for use in formulating possible new and/or amended contentions, we refer once again to the SUNSI/SGI Order issued in this matter, which we believe establishes the proper procedure for a party to request access to SUNSI information in this proceeding. 74 Fed. Reg. at 6179. You have not explained how a draft guidance document is necessary to form the basis and specificity for a proffered contention. Contentions must be based on the application and must provide sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(vi). DC/COL-ISG-016 is not a part of the combined license (COL) application, and therefore does not, by itself, demonstrate a dispute with the Applicant. See *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee

Nuclear Power Station), LBP-06-20, 64 NRC 131, 200 - 201 (2006) (in absence of documentary or expert support, reliance on a guidance document to form the basis of a proposed contention did not demonstrate a genuine dispute with the applicant), *reversed on other grounds, Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station) CLI-07-16, 65 NRC 371 (2007). DC/COL-ISG-016 is a draft guidance document and is not a legal requirement. See *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 89 (2008); *Crow Butte Resources, Inc.* (License Amendment for the North Trend Expansion Project), LBP-08-06, 67 NRC 241, 323 (2008), *reversed in part on other grounds*, CLI-09-12, 69 NRC ____ (June 25, 2009) (slip op. at 24). As DC/COL-ISG-016 has not yet been approved for use, it does not provide an approved means to comply with a regulatory requirement.

Your statements that access to this draft guidance document is necessary “for meaningful participation in the adjudicatory proceeding because it clarifies or addresses issues not discussed in the Standard Review Plan governing compliance with 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2)[,]” and that “[t]he Intervenor[s] cannot meaningfully analyze applicants’ claims that they comply with the guidance for new reactor submittals without having access to the guidance itself[,]” do not meet the requirements of the SUNSI/SGI Order. 74 Fed. Reg. at 6197. Your broad request for SUNSI that may have a bearing on the Intervenor[s]’ unspecified new or amended contentions does not provide sufficient information to determine that you have demonstrated a need for SUNSI access. To demonstrate the requisite need, you must (1) describe why publicly available versions of the Application and/or the nonpublic portions of the Application to which you have already been given access are not sufficient to provide the basis and specificity for a proffered contention, and (2) describe the basis for a proffered contention. By failing to make this showing, you have not demonstrated that you need access to the SUNSI information you now request. *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* (South Texas Project, Units 3 and 4), LBP-09-05, 69 NRC 303, 308, 312 - 313 (2009).

In conclusion, while Intervenor[s] have standing to intervene in this proceeding, the NRC Staff has determined that Intervenor[s] have not demonstrated a legitimate need for access to DC/COL-ISG-016 in order to meaningfully participate in this adjudicatory proceeding at this time. Intervenor[s]’ request for access to DC/COL-ISG-016 is denied. You may challenge the Staff’s denial of your request by filing a challenge within 5 days of your receipt of this determination with the presiding officer designated in this proceeding. 74 Fed. Reg. at 6180.

Sincerely,

/Signed Electronically By/

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC Staff's November 16, 2009 Letter Denying Intervenors' SUNSI Request/ISG-016, has been served on the following persons by Electronic Information Exchange on this 16th day of November, 2009:

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Dated at Rockville, Maryland
this 16th day of November, 2009