

November 25, 2009

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))

NRC STAFF'S REPLY TO INTERVENORS'
CHALLENGE OF THE NRC STAFF'S DENIAL OF ACCESS TO SUNSI

The NRC staff (Staff) hereby replies to the Intervenor's challenge to the Staff's denial of access to the draft interim staff guidance (ISG), DC/COL-ISG-016, in accordance with the "Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information [SUNSI] and Safeguards Information [SGI] for Contention Preparation" (SUNSI/SGI Order) that was issued with the notice of hearing in this proceeding. 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). After reviewing the Intervenor's request and subsequent appeal of the Staff's determination, the Staff maintains that the Intervenor has not met the standards for access set forth in the SUNSI/SGI Order.

BACKGROUND

Through an email sent to the Hearing Docket November 5, 2009, as amended by emails submitted on November 5, 2009, and November 9, 2009, (Intervenor's Access Request), the Intervenor requested that Robert Eye, Karen Hadden, Eliza Brown, and Edwin Lyman, Ph.D,

be granted access to a draft staff guidance document, DC/COL-ISG-016.¹ Because this draft guidance document contains security-related information, it is not available to the public. On October 13, 2009, a notice related to this non-public ISG was published on the NRC website at <http://www.nrc.gov/reading-rm/doc-collections/isg/col-dc-isg-16.pdf>. This notice states that the purpose in developing DC/COL-ISG-016 is to assist COL applicants and licensees with meeting the requirements of 10 C.F.R. §§ 50.54(hh)(2) and 52.80(d). *Id.*

The Intervenor's request for access relates to their proposed contentions challenging the Mitigative Strategies Report submitted by Luminant Generation Company, LLC (Applicant). On August 10, 2009, the Intervenor submitted five contentions challenging the Applicant's compliance with 10 C.F.R. §§ 50.54(hh)(2) and 52.80. "Intervenor's Contentions Regarding Applicant's Submittal Under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2) and Request for Subpart G Hearing" (Mitigative Strategies Contentions). Oral argument on these contentions was held on November 12, 2009.

The Staff denied the Intervenor's Access Request on November 16, 2009 (Staff's Denial), after determining that the Intervenor had not shown a need for the information according to the standards set out in the SUNSI/SGI Order.² The Intervenor challenged this determination through correspondence submitted on November 20, 2009, which the Intervenor requested be treated as an appeal of the Staff Denial (Intervenor's Appeal).³

¹ The Intervenor submitted one request for access on the dockets for both the Comanche Peak combined license (COL), Units 3 and 4, proceeding and the South Texas Project, Units 3 and 4, COL proceeding. The Intervenor's subsequent challenge to the Staff's determination was also submitted as one request on both the Comanche Peak and South Texas Project dockets. This reply, however, will only address the aspects of these submissions relating to the Comanche Peak COL proceeding. A separate reply will be filed in the South Texas Project COL proceeding.

² Letter from Susan Vrahoretis to Robert Eye, 11/5/2009, Request for Sensitive Unclassified Non-Safeguards Information, 11/5/2009 Amended Request for Sensitive Unclassified Non-Safeguards Information and 11/9/2009 Amended Request for Sensitive Unclassified Non-Safeguards Information (Nov. 16, 2009) (ADAMS Accession No. ML093200712).

³ Attachment One to the SUNSI/SGI Order, however, styles such a challenge as "a motion seeking a ruling to reverse the NRC staff's denial of access." 74 Fed. Reg. at 6181.

DISCUSSION

I. SUNSI-SGI Access Procedures

The SUNSI/SGI Order in this proceeding was issued pursuant to procedures outlined by the Commission in 2008. See Procedures to Allow Potential Intervenors to Gain Access to Relevant Records That Contain Sensitive Unclassified Non-Safeguards Information or Safeguards Information (Feb. 28, 2008) (ADAMS Accession No. ML080380626) (“Access Procedures”).⁴ The Commission issued the Access Procedures to provide an avenue for those needing SUNSI, or having a need to know for SGI, to “receive relevant information to prepare a valid contention.” *Id.* at 2.

The SUNSI/SGI Order issued in this proceeding provides for access to SUNSI if there is a reasonable basis to believe that the petitioner is likely to establish standing and there is a legitimate need for the information. SUNSI/SGI Order, 74 Fed. Reg. at 6179. To show a legitimate need for the information, the requester must explain why it needs 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.” *Id.*

II. The Intervenors Have Not Met the Standards for Access.

The NRC staff correctly denied the Intervenors’ request for access to the draft DC/COL-ISG-016. Although the Intervenors’ standing has been established, the Intervenors did not show a need for DC/COL-ISG-016 to prepare a valid contention. Specifically, the Intervenors did not demonstrate why the publicly available versions of the application and the nonpublic information in the Intervenors’ possession were insufficient to form the basis and specificity for a proffered contention. See SUNSI/SGI Order, 74 Fed. Reg. at 6179. Based on

⁴ The availability of the final Access Procedures was announced in the *Federal Register*. Delegated Authority To Order Use of Procedures for Access to Certain Sensitive Unclassified Information, 73 Fed. Reg. 10,978 (Feb. 29, 2008).

the information available to them, and with the assistance of an expert, the Intervenors were able to submit five contentions on August 10, 2009, almost two months before the notice regarding the draft DC/COL-ISG-016 was published on the NRC's public website. The Intervenors have already proven themselves capable of submitting contentions based on the information available to them, and have not shown that the draft DC/COL-ISG-016 is needed to provide the basis and specificity for a proffered contention.⁵

A. The Intervenors Have Not Demonstrated a Need for the Draft DC/COL-ISG-016 for Intervenors' Pending Contentions.

The Intervenors' Appeal focuses on the relevancy of the draft DC/COL-ISG-016 to the Intervenors' *pending* contentions, Intervenors Appeal at 1, but the SUNSI/SGI Order was intended to provide information needed for contention preparation. See SUNSI/SGI Order, 74 Fed. Reg. at 6179, and Access Procedures at 2. The Intervenors' Mitigative Strategies Contentions have already been drafted and submitted based on available information, and the Intervenors have not shown why this available information "would not be sufficient to provide the basis and specificity for" their pending contentions. See SUNSI/SGI Order, 74 Fed. Reg. at 6179.

B. Intervenors Have Not Demonstrated a Need for the Draft DC/COL-ISG-016 to Submit New or Amended Contentions.

In order to demonstrate a need for the information, the Intervenors must (1) discuss the basis for a proffered contention and (2) describe why the information available to the Intervenors is not sufficient to provide the basis and specificity for a proffered contention. See *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, 312-13 (2009). The Intervenors fail to meet this burden.

⁵ The NRC Staff opposed admission of all of these contentions for failure to satisfy the contention admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1).

As required by 10 C.F.R. § 2.309(f)(1)(vi), 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. The draft 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 the absence of documentary or expert support, reliance on a guidance document to form the basis of a proposed contention does not, by itself, demonstrate a 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). The Intervenors assert that they need access to the draft DC/COL-ISG-016 because it “has a direct bearing on whether the Applicants’ submittals are consistent with the Staff’s interpretation of the requirements under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2).” Intervenors Appeal at 1. However, this assertion fails to demonstrate, with specificity, why the information the Intervenors have been given access to is “not sufficient to support the basis and specificity for a proffered contention.” See *South Texas*, LBP-09-05, 69 NRC at 313.

The Intervenors argue that they “cannot meaningfully analyze Applicants’ claims that they comply with 10 C.F.R. § 50.54(hh)(2) for new reactor submittals without having access to the subject guidance itself.” Intervenors Appeal at 1. The Intervenors have, however, had access to the Applicant’s Mitigative Strategies Report since July 7, 2009,⁶ had an opportunity to review and analyze this Report, and have already submitted contentions on the Mitigative Strategies Report. The Intervenors continue to maintain that these contentions are admissible, despite their lack of access to the draft DC/COL-ISG-016. The admissibility of contentions does

⁶ The Mitigative Strategies Report was submitted on the Comanche Peak COL application docket pursuant to 10 C.F.R. § 52.80(d). The information required by 10 C.F.R. § 52.80, “Contents of applications; additional technical information,” is considered to be part of the COL application.

not hinge on access to a draft guidance document, which 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.). Moreover, as DC/COL-ISG-016 has not yet been approved for use, it does not yet provide an approved means to comply with a regulatory requirement.⁷

CONCLUSION

For the reasons explained above, the Intervenor do not meet the requirements for access to the draft DC/COL-ISG-016. Although the Intervenor have established standing, they have not demonstrated that they need the draft DC/COL-ISG-016 to provide the basis and specificity for a proffered contention. Therefore, the Licensing Board should affirm the Staff's Denial.

Regarding Motion Certifications

The consultation requirements of 10 C.F.R. § 2.323 require that motions contain certifications regarding consultation. 10 C.F.R. § 2.323(b). Although a challenge to a Staff denial of access to SUNSI is called a "motion" in Attachment 1 of the SUNSI/SGI Order, 74 Fed. Reg. at 6181, such challenges appear to be motions pursuant to the SUNSI/SGI Order rather than motions pursuant to 10 C.F.R. § 2.323. Therefore, it does not appear that the consultation requirements of 10 C.F.R. § 2.323 apply to either the Intervenor's Appeal or this reply. The Staff believes, however, that the inter-party interactions preceding the Intervenor's Appeal have

⁷ The Intervenor also assert that "NEI 06-12 is approved by the Commission only for current operating reactors, it is not approved for new reactor applications." Intervenor's Appeal at 1. Although the Commission endorsed the use of guidance, including NEI-06-12, Revision 2, "as an acceptable method for current reactors to comply with the mitigative strategies requirement," the Commission also stated that "[n]ew reactor licensees are required to employ the same strategies as current reactor licensees to address core cooling, spent fuel pool cooling, and containment integrity." Power Reactor Security Requirements; Final Rule, 74 Fed. Reg. 13,926, 13,957, 13,958 (Mar. 27, 2009). Unlike current operating reactors, new reactors "also need to account for, as appropriate, the specific features of the plant design . . ." *Id.* at 13957.

complied with the principle of consultation set forth in 10 C.F.R. § 2.323. Before the Intervenors submitted their Access Request, counsel for Intervenors and the Staff engaged in email correspondence regarding the Intervenors' Access Request, and the Intervenors' Access Request and the Staff Denial both set forth in detail the positions of the parties. Despite their sincere efforts to resolve the issues concerning the Intervenors' Access Request, the parties have been unable to come to agreement on access to the draft DC/COL-ISG-016.

Respectfully submitted,

/Signed Electronically By/

Susan H. Vrahoretis
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-4075
Susan.Vrahoretis@nrc.gov

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CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC Staff's Reply to Intervenors' Challenge of the NRC Staff's Denial of Access to SUNSI, has been served on the following persons by Electronic Information Exchange on this 25th day of November, 2009:

Administrative Judge
Ann Marshall Young, Chair
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Ann.Young@nrc.gov

Office of Commission Appellate
Adjudication
Mail Stop O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail:OCAAMail@nrc.gov

Administrative Judge
Gary S. Arnold
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Gary.Arnold@nrc.gov

Office of the Secretary
ATTN: Docketing and Service
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

Administrative Judge
Alice C. Mignerey
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Alice.Mignerey@nrc.gov

Robert V. Eye
Kauffman & Eye
Suite 202
112 SW 6th Ave.
Topeka KS 66603
bob@kauffmaneye.com

Steven P. Frantz
Jonathan M. Rund
Martin J. O'Neill
Stephen J. Burdick
Timothy P. Matthews
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: sfrantz@morganlewis.com
jrund@morganlewis.com
martin.o'neill@morganlewis.com
sburdick@morganlewis.com
tmatthews@morganlewis.com

/Signed (electronically) by/
Susan H. Vrahoretis
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-4075
Susan.Vrahoretis@nrc.gov

Dated at Rockville, Maryland
this 25th day of November, 2009