

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

LBP 10-02

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael M. Gibson, Chairman  
Dr. Gary S. Arnold  
Dr. Randall J. Charbeneau

In the Matter of

SOUTH TEXAS PROJECT NUCLEAR  
OPERATING CO.

(South Texas Project Units 3 and 4)

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

ASLBP No. 09-885-08-COL-BD01

January 29, 2010

ORDER

(Rulings on the Admissibility of New Contentions and on  
Intervenors' Challenge to Staff Denial of Documentary Access)

This proceeding involves the 10 C.F.R. Part 52 application of the South Texas Project Nuclear Operating Company ("STP" or the "Applicant")<sup>1</sup> seeking combined operating licenses ("COL") for two new nuclear units, using the Advanced Boiling Water Reactor certified design, at its site in Matagorda County, Texas. Two matters are before the Licensing Board for resolution. First, Intervenors<sup>2</sup> have asserted seven new contentions that challenge the adequacy of the Applicant's May 26, 2009 Mitigative Strategies Report, which addresses the possible loss of large areas of the nuclear plant due to fires or explosions. Second, Intervenors have challenged NRC Staff's refusal to provide them with access to DC/COL-ISG- 016 ("ISG-016")<sup>3</sup>, a Draft

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<sup>1</sup> STP filed the Application on behalf of the joint applicants for STP Units 3 and 4, including NRG South Texas 3 LLC, NRG South Texas 4 LLC, and the City of San Antonio, Texas, acting by and through the City Public Service Board ("CPS Energy").

<sup>2</sup> Intervenors are the Sustainable Energy and Economic Development Coalition ("SEED"), the South Texas Association for Responsible Energy, and Public Citizen.

<sup>3</sup> NRC Staff posted a notice about the existence of ISG-016 on its public website at <http://www.nrc.gov/reading-rm/doc-collections/isg/col-dc-isg-16.pdf> (dated Oct. 7, 2009). We note that a document on the NRC Intranet entitled "New Reactors Hot Topics" and dated January 15, 2010 stated that NRC Staff developed "DC/COL-ISG-016, Compliance with 10

Interim Staff Guidance document that the NRC Staff has designated as containing Sensitive Unclassified Non-Safeguards Information (“SUNSI”). As discussed below, we hold that all seven of these newly proffered contentions are inadmissible, and we sustain Intervenor’s challenge regarding documentary access to the extent NRC Staff is directed to reevaluate Intervenor’s request for ISG-016 in accordance with this Order.

### I. Background

As catalogued in detail in a prior order in this case,<sup>4</sup> Intervenor challenge the Applicant’s efforts to obtain COLs to build and to operate two additional nuclear reactors in Matagorda County, Texas, on the site where the Applicant currently operates two reactors. Previously, this Board accorded standing to Intervenor and admitted five of their twenty-eight original contentions.<sup>5</sup>

The instant disputes arise as a result of the Applicant’s May 26, 2009 addendum to its combined license application (“COLA”).<sup>6</sup> This addendum, in turn, is based on the Applicant’s Mitigative Strategies Report, also submitted on May 26, 2009, which was prepared to comply with 10 C.F.R. §§ 50.54(hh)(2) and 52.80(d).<sup>7</sup> On August 14, 2009, Intervenor submitted seven additional contentions that relate to this May 26, 2009 addendum. Both the Applicant and

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C.F.R. 50.54(hh)(2) and 10 C.F.R. 52.80(d) Loss of Large Areas of the Plant due to Explosions or Fires from a Beyond-Design Basis Event,” to endorse NEI 06-06 Revision 3. The ISG public comment period closed on November 17, 2009, and NRC Staff is reviewing the comments. The document stated that issuance of the final version is expected in January 2010. We expect, therefore, that ISG-016 will soon be finalized, issued, and possibly renamed. Throughout this Order, when we refer to ISG-016, we are referring to its most up-to-date version, regardless of its designation at that time.

<sup>4</sup> LBP-09-21, 69 NRC \_\_ (slip op.) (Aug. 27, 2009).

<sup>5</sup> Id.; LBP-09-25, 69 NRC \_\_ (slip op.) (Sep. 29, 2009).

<sup>6</sup> See 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 (Aug. 14, 2009) at 1 [hereinafter Intervenor’s New Contentions].

<sup>7</sup> See Letter from Scott Head, Manager, Regulatory Affairs, STP Units 3 and 4, to NRC Document Control Desk (May 26, 2009) (ADAMS Accession No. ML091470723). The Mitigative Strategies Report is not, however, publicly available because the Applicant maintains it contains SUNSI.

NRC Staff filed answers opposing Intervenor's submission.<sup>8</sup> Intervenor's filed a reply to both the Applicant's and NRC Staff's answers on September 15, 2009.<sup>9</sup> On November 13, 2009, this Board heard oral argument in Rockville, Maryland, regarding admissibility of the proposed new contentions.<sup>10</sup>

The dispute surrounding ISG-016, which had not fully emerged prior to oral argument, and thus was not addressed there, arose as a result of the NRC Staff announcing on its public website, on October 13, 2009, that ISG-016 existed.<sup>11</sup> However, because NRC Staff designated ISG-016 as SUNSI—claiming it contains “security-related” information<sup>12</sup>—the public (including Intervenor's) were not afforded access to this document. As a result, on November 5, 2009, Intervenor's sought to obtain ISG-016 from NRC Staff. On November 16, 2009, NRC Staff declined to afford Intervenor's access to ISG-016. As a result, on November 20, 2009, Intervenor's prosecuted a challenge to the denial of access.<sup>13</sup>

## II. SUNSI and Public Access Concerns

Before addressing Intervenor's seven new contentions—the discussion of which is set forth in subsequent parts of this Order that are under seal and inaccessible to the public—we turn first to the issue of public access and SUNSI.

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<sup>8</sup> STP Nuclear Operating Company's Answer Opposing Late-Filed Contentions Regarding the Mitigative Strategies Report (Sept. 4, 2009) [hereinafter STP Answer New Contentions]; NRC Staff's Answer to Intervenor's Contentions and Request for a Subpart G Hearing (Sept. 8, 2009) [hereinafter Staff Answer New Contentions].

<sup>9</sup> Intervenor's Consolidated Response to the Answers of Applicant and NRC Staff to the Intervenor's Contentions Regarding Applicant's Submittal Under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2) (Sept. 15, 2009) [hereinafter Intervenor's Response]. On September 8, 2009, Intervenor's moved to file a consolidated response to the answers of both Applicant and Staff. See Intervenor's Motion to File a Consolidated Response to NRC Staff and Applicant Answers to Contentions Regarding 10 C.F.R. § 50.54(hh)(2) (Sept. 8, 2009). Because a consolidated response was not improper, the Board considered the reply in its evaluation of the admissibility of the proposed contentions.

<sup>10</sup> Tr. at 551-759.

<sup>11</sup> See Letter from Michael Spencer to Robert Eye at 1 (Nov. 16, 2009).

<sup>12</sup> Id.

<sup>13</sup> Letter from Robert Eye to Judges Young and Gibson (Nov. 20, 2009).

Access to SUNSI here is sought in adjudication rather than in a request for information under the Freedom of Information Act (“FOIA”), and the reasons for providing access to Intervenor are even more compelling than they are when a member of the public seeks information under FOIA. Here, a party is seeking the information not merely as an interested member of the public, but as a litigant focused on a specific document that may augment the pleading and proof of its claims. Moreover, NRC Staff, as a party opposing Intervenor’s claims, is refusing to provide the requested document. A participant in administrative litigation—having an even greater interest in obtaining access to SUNSI than does the general public—is entitled to obtain documents under standards no more restrictive than would be accorded the general public under FOIA.

FOIA provides, with nine enumerated exceptions, that each agency make copies of all records available to the public.<sup>14</sup> NRC regulations implement and repeat this FOIA obligation.<sup>15</sup> In addition, NRC regulations provide, with certain very limited exceptions, that “all hearings will be public,”<sup>16</sup> and that the public is entitled to copies of the transcripts of all hearings.<sup>17</sup>

Thus, if it seeks to withhold a document from a party or the public, or to bar a party or member of the public from attending any adjudicatory proceeding before a Licensing Board, NRC Staff must carry the burden of proving that the document or situation fits meets one of FOIA’s specifically enumerated exceptions.<sup>18</sup> Moreover, even if a document contains information that is exempt from disclosure, FOIA mandates that “[a]ny reasonably segregable portion of the record shall be provided to any person requesting such record after deletion of the portions which are exempt.”<sup>19</sup> NRC’s FOIA regulations implement this mandate.<sup>20</sup>

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<sup>14</sup> 5 U.S.C. § 552(a)-(b).

<sup>15</sup> See 10 C.F.R. §§ 9.15, 2.390.

<sup>16</sup> 10 C.F.R. § 2.328.

<sup>17</sup> 10 C.F.R. § 2.327(c).

<sup>18</sup> See 10 C.F.R. §§ 2.325 and 2.390 (proponent of protective order shoulders burden of proof).

<sup>19</sup> 5 U.S.C. § 552(b)(9).

<sup>20</sup> See 10 C.F.R. § 9.19. Safeguards Information (“SGI”) is an example of a FOIA exemption. Under FOIA, and the NRC regulations implementing FOIA, the duty to make all documents

For decades, the Commission has restricted public access to classified information and SGI.<sup>21</sup> These restrictions on the dissemination and handling of such materials have a clear statutory and regulatory foundation.<sup>22</sup>

Approximately four years ago, NRC Staff began to assert an additional category of information that, it believes, also warrants protection from public access.<sup>23</sup> Specifically, the NRC's Executive Director of Operations developed a new classification category, SUNSI, which the Executive Director asserted was exempt from disclosure.<sup>24</sup> The Executive Director then directed NRC Staff to implement it.<sup>25</sup> As far as this Board is aware, however, there is no statutory or regulatory definition of "SUNSI." The term "sensitive unclassified non-safeguards information" or SUNSI is apparently used only twice in the NRC regulations. First, the regulations authorize the Secretary of the Commission to establish procedures for obtaining access to SUNSI prior to granting intervention in a licensing proceeding.<sup>26</sup> Second, the

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available does not apply to records "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3); 10 C.F.R. § 2.390(a)(3). SGI qualifies for this exemption because the Atomic Energy Act specifically exempts it from disclosure. 42 U.S.C. § 2167. The NRC has promulgated regulations implementing the FOIA exemption for SGI. See 10 C.F.R. § 73.21. Likewise, FOIA exempts classified information from disclosure, 5 U.S.C. § 552(b)(1), and NRC regulations implement this exemption. 10 C.F.R. § 2.390(a)(1); 10 C.F.R. Part 2 Subpart I; 10 C.F.R. Part 95.

<sup>21</sup> See 10 C.F.R. §§ 95.34, 73.21; 38 Fed. Reg. 35,430 (Dec. 28, 1973).

<sup>22</sup> See supra n.20.

<sup>23</sup> See NRC Briefing on Sensitive Unclassified Non-Safeguards Information Policy (Feb. 2, 2006) at 8, available at <http://www.nrc.gov/reading-rm/doc-collections/commission/tr/2006/20060202b.pdf> ("Over time, the EDO's [Executive Director of Operations] office and the staff had recognized, particularly in a number of reviews we did to look at root causes for the inadvertent release of information. What we found was . . . that a large share of our documents were being marked "official use only" . . . . There was inconsistent treatment in document markings.").

<sup>24</sup> See Management of Sensitive Unclassified Non-Safeguards Information, Task Force Report for the Executive Director of Operations (Nov. 10, 2004) at 1 (ADAMS Accession No. ML 043010551).

<sup>25</sup> See Memorandum from Luis A. Reyes, NRC Executive Director of Operations to Office Directors and Regional Administrators (Jan. 19, 2005) (ADAMS Accession No. ML043500718).

<sup>26</sup> 10 C.F.R. § 2.307(c).

regulations authorize interlocutory appeal to the Commission of certain rulings relating to SUNSI.<sup>27</sup> But these regulations never define the term.

The only plausibly relevant regulation that helps circumscribe the concept of SUNSI is 10 C.F.R. § 2.390(d), which specifies in pertinent part:

The following information is considered commercial or financial information within the meaning of § 9.17(a)(4) of this chapter and is subject to disclosure in accordance with the provisions of § 9.19 of this chapter.

1. Correspondence and reports to or from the NRC which contain information or records concerning a licensee's or applicant's physical protection, classified matter protection, or material control and accounting program for special nuclear material, not otherwise designated as Safeguards Information or classified as National Security Information or Restricted Data....

Although 10 C.F.R. § 2.390(d) never uses the term SUNSI, this regulation seems to fit NRC Staff's claim that SUNSI is "security-related," and it is our best lodestar as to the meaning of this term. Under this regulation, in order for a document to qualify as exempt from FOIA disclosure as "SUNSI" the document must:

1. Qualify as commercial or financial information under 10 C.F.R. § 9.17(a)(4) (commonly referred to as "FOIA Exemption 4")<sup>28</sup>;
2. Constitute "correspondence and reports to or from NRC;"
3. Contain information or records concerning a licensee's or applicant's
  - i. Physical protection of special nuclear material;
  - ii. Classified matter protection, or
  - iii. Material control and accounting program relating to special nuclear material;
4. Not constitute Safeguards Information; and
5. Not constitute classified information (National Security Information or Restricted Data).

Against this legal background, we turn to the NRC Staff's current claim that ISG-016 is exempt from disclosure and must be withheld from Intervenors and the public.<sup>29</sup> In a November

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<sup>27</sup> 10 C.F.R. §§ 2.311(a)(3); 2.311(d)(2).

<sup>28</sup> There are additional criteria for determining whether information may be withheld from the public as exempt commercial or financial information. See 10 C.F.R. § 2.390(b)(3)-(4).

<sup>29</sup> We note that the NRC public website states that SUNSI "encompasses a wide variety of categories (e.g., personnel privacy, attorney-client privilege, confidential source, etc.)." <http://www.nrc.gov/security/info-security.html#cfr> (last visited Jan. 28, 2010). This assertion is inconsistent with 10 C.F.R. § 2.390(d). There is no legal basis for sweeping aside the well-established (and long-recognized) privileges such as the Privacy Act, 5 U.S.C. § 552(a), and the

5, 2009 letter to NRC Staff, intervenors requested access to ISG-016, a document that the NRC Staff maintains is SUNSI “because it contains security-related information.”<sup>30</sup> Intervenor represented that they sought ISG-016 to afford them “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).”<sup>31</sup> Intervenor also asserted that they cannot meaningfully analyze the Applicant’s claim that it has complied with the staff’s guidance related to 10 C.F.R. § 50.54(hh)(2) without having access to this guidance document.<sup>32</sup>

NRC Staff claims that it evaluated intervenors’ request for ISG-016 pursuant to the “Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation” (“SUNSI Access Order”).<sup>33</sup> That order states that requests for access to SUNSI will be granted where the requestor both establishes standing to intervene in the proceeding (or a likelihood of obtaining it), and “demonstrate[s] a need for access to SUNSI.”<sup>34</sup> Although conceding that intervenors have standing in this

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Attorney-Client Privilege (see Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI 95-15, 42 NRC 181 (1995)) into the new and foreign rubric of SUNSI.

<sup>30</sup> Letter from Michael Spencer to Robert Eye at 1. By NRC’s own admission, the SUNSI designation protects “information about a licensee’s or applicant’s physical protection or material control and accounting program for special nuclear material not otherwise designated as [SGI] or classified as National Security Information or Restricted Data.” NRC: Information Security, <http://www.nrc.gov/security/info-security.html#cfr> (last visited Jan. 28, 2010). While we are not asked directly to resolve questions about the SUNSI designation process, we note that because ISG-016 was created by NRC Staff, the Staff’s designation of its own material as SUNSI is inconsistent with SUNSI’s purported objective of protecting licensee or applicant data. See 10 C.F.R. § 2.390(d).

<sup>31</sup> Letter from Robert Eye to NRC Staff (Nov. 5, 2009).

<sup>32</sup> Id. Additionally, intervenors claim that the Applicant erroneously used another guidance document, NEI 06-12, asserting it is currently approved by the Commission for use only with respect to existing, not new, reactors. Id.

<sup>33</sup> The SUNSI Access Order is appended to the notice of hearing, which here is found at 74 Fed. Reg. 7934, 7936 (Feb. 20, 2009). See also Letter from Michael Spencer to Robert Eye at 2.

<sup>34</sup> 74 Fed. Reg. at 7937. However, we note a disparity between the standard articulated in the SUNSI Access Order (which NRC Staff stated it used to evaluate intervenors’ request) and that described in another document entitled “NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information.” The latter states that “no person . . . may have access to SUNSI unless that person has an established need-to-know the information for

proceeding, NRC Staff stated that Intervenor failed to establish their need for access to ISG-016. Specifically, NRC Staff determined that Intervenor “have not explained how a draft guidance document is necessary to form the basis and specificity for a proffered contention.”<sup>35</sup> Intervenor challenged the Staff’s denial of their request for ISG-016 to this Board on November 20, 2009. We direct NRC Staff to reevaluate Intervenor’s request for ISG-016.

At the outset, it is noteworthy that it is not at all clear whether the SUNSI Access Order procedures apply to proceedings once a petition to intervene has been granted.<sup>36</sup> However,

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conducting official business.” NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information at 2-3 (ADAMS Accession No. ML051220287) (emphasis added). In 2008, the Commission established procedures for deciding whether parties may access SGI or SUNSI in a proceeding. The Commission determined that the Secretary “will assess initially whether the proposed recipient has shown a need for SUNSI (or need to know for SGI).” Delegated Authority To Order Use of Procedures for Access to Certain Sensitive Unclassified Information, 73 Fed. Reg. 10,978, 10,979 (Feb. 29, 2008); see also 10 C.F.R. § 2.307(c); Procedures to Allow Potential Intervenor to Gain Access to Relevant Records That Contain [SUNSI] or [SGI], Attachment 1, Procedures for Access to [SUNSI] and [SGI] for Contention Preparation at 5 (Feb. 29, 2008) (ADAMS Accession No. ML080380626). In both of these Orders, the Commission has effectively renounced the notion that a party must establish its “need to know” in order to obtain access to SUNSI. Accordingly, any suggestion—in the NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information, or otherwise—that a party seeking access to SUNSI must first demonstrate a “need to know” is erroneous.

<sup>35</sup> Letter from Michael Spencer to Robert Eye at 2. NRC Staff also denied access to Intervenor by claiming that “[c]ontentions 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.” *Id.* While this statement, on its own, is not inaccurate, it is completely irrelevant to Intervenor’s request for ISG-016.

<sup>36</sup> This dispute comes before us, not pursuant to a motion to compel production of this document, but rather as a result of Intervenor requesting access to ISG-016 from NRC Staff pursuant to the SUNSI Access Order that was part of the original Notice of Hearing in this case. 74 Fed. Reg. at 7936. Likewise, it was pursuant to the SUNSI Access Order that NRC Staff denied such access and that Intervenor prosecuted this challenge to that denial of access. A SUNSI Access Order, which appears in most, if not all, such notices that NRC Staff issues appears to be a creature of 10 C.F.R. § 2.307(c). That regulation states: “In circumstances where, in order to meet the Commission requirements for intervention, potential parties may deem it necessary to obtain access to . . . sensitive unclassified non-safeguards information, the Secretary is delegated authority to issue orders establishing procedures and timelines for submitting and resolving requests for this information.” Thus, it appears that the Commission intended the SUNSI Access Order to apply only during the time period bracketed, on one end, by the issuance of the Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, and, on the other end, by the issuance of the Order granting intervention.

Consistent with this interpretation, the SUNSI Access Order sets a time-schedule that starts 10 days after the Notice is issued, and generally ends before the presiding officer or

even assuming arguendo that the procedures outlined in the SUNSI Access Order continue to have vitality after a petition for intervention has been granted, it is clear that the NRC Staff misapplied them here. First, NRC Staff improperly characterized Intervenors' request for access to ISG-016. Intervenors stated that they sought access to ISG-016 because it is relevant to their assessment of the Applicant's compliance with 10 C.F.R. §§ 50.54(hh)(2) and 52.80(d).<sup>37</sup> When NRC Staff denied Intervenors' request for ISG-016 on November 16, 2009<sup>38</sup> (three days after this Board heard oral argument on the Intervenors' contentions related to the Applicant's mitigative strategies), it asserted Intervenors had failed to explain why ISG-016 was necessary to provide the basis and specificity for those contentions.<sup>39</sup> In fact, the very existence of ISG-016 was not publicly announced until October 13, 2009,<sup>40</sup> nearly two full months after

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Board has been created. Likewise, 10 C.F.R. § 2.307(c) suggests that this new and novel method is intended only to deal with issues arising before intervention occurs and a Board is created. Therefore, the procedures and schedules set forth in the SUNSI Access Order should not govern the resolution of disputes concerning access to SUNSI once the intervention petition has been granted and the Intervenors have become actual parties to adjudication—as opposed to the “potential parties” that are referenced in the SUNSI Access Order. Finally, it is significant that the SUNSI Access Order is issued by the Commission or NRC in its role as “supervisor” of NRC Staff and does not constitute an adjudicatory ruling by the Commission. See Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 and 2) CLI-10-06 Slip op. at 18 n.49; (“As the courts have held repeatedly, following the Supreme Court’s lead in Withrow v. Larkin, in practicality an agency head often must act on the same matter initially as supervisor and later as adjudicator . . .”). Finally, it is of note that for more than 50 years, Atomic Safety and Licensing Boards have been invested, pursuant to 10 C.F.R. Part 2, with responsibility for resolving disputes concerning discovery and the scope of claimed privileges and FOIA exemptions .

Nevertheless, because of the unusual procedural posture that brought this matter before us, because of NRC Staff's failure to provide a clear, adequate basis on which it would deny Intervenors access to ISG-016, and because NRC Staff has not made available to Intervenors (and the general public) the reasonably segregable non-SUNSI portions of ISG-016, we are directing NRC Staff to reevaluate its decision. Certainly, our decision directing NRC Staff to reevaluate its denial of access to ISG-016 should not be deemed to suggest that the Commission intended, by including a SUNSI Access Order in its Notices of Hearing, to create an additional set of procedures for the resolution of disputes concerning SUNSI that may be brought before Licensing Boards after intervention has been granted.

<sup>37</sup> Letter from Robert Eye to NRC Staff (Nov. 5, 2009); Letter from Robert Eye to Judges Young and Gibson (Nov. 20, 2009).

<sup>38</sup> Letter from Michael Spencer to Robert Eye at 2.

<sup>39</sup> Id.

<sup>40</sup> See id. at 1.

Intervenors had submitted their contentions and certainly long after the deadline had passed for filing pleadings with respect to the Applicant's mitigative strategies.

Second, in evaluating Intervenors' request for access to ISG-016, NRC Staff imposed additional burdens on Intervenors that are not warranted under the standards for access to SUNSI. The SUNSI Access Order obligates a party seeking SUNSI only to explain its "need for the information in order to meaningfully participate in this adjudicatory proceeding."<sup>41</sup> It requires nothing more. NRC Staff have attempted to add another requirement for access to ISG-016 that does not appear in the SUNSI guidance, asserting that Intervenors have not "demonstrated a legitimate need for access to DC/COL ISG-016 . . . particularly why it is necessary to provide the basis and specificity for the current contentions, which have already been formulated and submitted."<sup>42</sup> Contrary to NRC Staff's position, however, the requested document does not have to be directly applicable to an admissible contention—that requirement only applies when a public version of the requested SUNSI document is also available.<sup>43</sup> As long as Intervenors can show that access to ISG-016 may enable them to participate more meaningfully in this adjudicatory proceeding, they are to be provided that access.

Because the release of SUNSI poses less of a security threat than either classified information or SGI (where a party must establish a "need to know" to obtain access), there is no basis for piling such added burdens on Intervenors to demonstrate a "need for SUNSI." This is particularly so in light of the fact that the risks attendant to affording access to SUNSI are minimal. The SUNSI Access Order in this case provides that SUNSI is to be released to Intervenors only after they have executed a protective order that governs its use and

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<sup>41</sup> 74 Fed. Reg. at 7936.

<sup>42</sup> Letter from Michael Spencer to Robert Eye at 2.

<sup>43</sup> See 74 Fed. Reg. at 7936. Intervenors asserted that there is no publicly-available version of ISG-016. Letter from Robert Eye to NRC Staff; Letter from Robert Eye to Judges Young and Gibson. If a public version does exist, NRC Staff certainly has not so informed the Board.

dissemination.<sup>44</sup> In the instant proceeding, Intervenor sought access to ISG-016, a non-public document, because of the possibility that it contains information<sup>45</sup> to support their challenge to the Applicant's compliance with 10 C.F.R. §§ 50.54(hh)(2) and 52.80(d). Even though ISG-016 is only in draft form, Intervenor's request seems reasonable insofar as ISG-016 contains the most up-to-date information available regarding NRC Staff's view of what is necessary to comply with these regulations. Intervenor stated that they need ISG-016 because it is relevant to their dispute, and it appears reasonably calculated to assist them in forming new contentions.

In conjunction with the reevaluation of its refusal to provide Intervenor with access to ISG-016, NRC Staff is further directed to segregate those paragraphs of the document that contain SUNSI from those that do not contain SUNSI. NRC regulations require that documents containing classified information or SGI be evaluated paragraph-by-paragraph,<sup>46</sup> that those paragraphs containing classified information or SGI be redacted, and that the remaining

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<sup>44</sup> See SUNSI Access Order, 74 Fed. Reg. at 7937. That Order states that access to SUNSI will be granted if (among other requirements) "[t]he proposed recipient of the information has executed a Non-Disclosure Agreement or Affidavit and agrees to be bound by the terms of a Protective Order setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI and/or SGI." Id.

<sup>45</sup> We view this standard for obtaining access to SUNSI similar to that used in determining whether a discovery request is permissible under the Federal Rules of Civil Procedure: whether the information sought will assist the party in pleading or proving its claims. Federal Rule of Civil Procedure 26 states "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). Relevant information "need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Id. Similarly, a party may seek the SUNSI material to provide factual support for its pleadings or an admitted contention against a motion for summary disposition or at trial. The fact that a SUNSI document itself may not be admissible evidence is an insufficient basis for denying access. Rather, providing access to a party seeking the SUNSI may lead to the discovery of admissible evidence (e.g., a new data set that may be referenced in a SUNSI document). As long as there might be information in a SUNSI document that could be reasonably calculated to lead to obtaining factual support for a new contention, factual support to augment a contention that has already been plead, or evidence relative to an admitted contention, there is a need for SUNSI. In fact, because the instant dispute concerns solely whether Intervenor are to be accorded access to a document that might enable them to augment a pleading, the threshold for obtaining the document is even lower than that applied in a discovery context.

<sup>46</sup> See 10 C.F.R. 95.37(f); NRC Safeguards Information Security Program Handbook 12.7 Part II (June 25, 2008) at 8-9.

paragraphs (not containing such sensitive material) be available for disclosure to the public.<sup>47</sup>

Here, NRC Staff designated ISG-016 as SUNSI in its entirety and did not conduct such a paragraph-by-paragraph analysis.<sup>48</sup> The reasons for this are unclear—for disclosure of SUNSI poses less of a security threat than would disclosure of either classified information or SGI.

The practical effect of NRC Staff's decision not to conduct a paragraph-by-paragraph analysis of documents containing SUNSI has significance beyond their disclosure to Intervenor. On January 21, 2009, the President announced an Open Government Directive with three goals: (1) to ensure the federal government operates "with an unprecedented level of openness";<sup>49</sup> (2) to prevent "over classification" of documents;<sup>50</sup> and (3) to ensure "that the handling and dissemination of information is not restricted unless there is a compelling need."<sup>51</sup> The NRC recently announced that it would comply fully with this Presidential directive.<sup>52</sup>

Blocking public access to materials that are not SUNSI is inconsistent with the NRC's adoption of the Open Government Directive. Only by conducting a paragraph-by-paragraph review of

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<sup>47</sup> See 10 C.F.R. 95.37(f); NRC Safeguards Information Security Program Handbook 12.7 Part II (June 25, 2008) at 8-9.

<sup>48</sup> Apparently, this is not the first time NRC Staff has decided not to conduct a paragraph-by-paragraph review of documents containing SUNSI. See NRC Briefing on Sensitive Unclassified Non-Safeguards Information Policy at 2. Moreover, the documents that gave rise to the seven new contentions addressed elsewhere in this Order also were not analyzed on a paragraph-by-paragraph basis—instead the entire contents of these document were designated SUNSI, even though neither the Applicant nor NRC Staff indicated the type or amount of SUNSI information contained within these documents. The practical effect, of course, is improperly to shift the burden onto Intervenor to prove their need for the information without the benefit of proper redaction. This procedure is contrary, not only to the NRC's obligations under FOIA and its implementing regulations (discussed supra at nn. 13-20 and accompanying text), but as well to the notion that a party claiming a privilege or other protection bears the burden of pleading and proof to maintain that privilege. See e.g., *Smith v. FTC*, 403 F. Supp. 1000, 1016 (D. Del. 1975) (once the requesting party meets its burden of demonstrating a need for the document, "the burden is upon the claimant of executive privilege to demonstrate a proper entitlement to exemption from disclosure").

<sup>49</sup> Memorandum: Classified Information and Controlled Unclassified Information, 74 Fed. Reg. 26,277, 26,277 (May 27, 2009).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 26279.

<sup>52</sup> See NRC Seeks Input on Open Government Initiative, <http://www.nrc.gov/reading-rm/doc-collections/news/2010/10-007.html> (last visited Jan. 29, 2010); Implementation of Open Government Initiative, 75 Fed. Reg. 1418, 1419 (Jan. 11, 2010).

ISG-016 and affording full public access to the non-SUNSI portions can NRC Staff comply with this directive. Certainly, if ISG-016 contains classified information or SGI, that information should be re-designated as such, with appropriate restrictions placed on its dissemination. In addition, NRC Staff should, at a minimum, conduct a paragraph-by-paragraph review of ISG-016 and provide Intervenors with those reasonably segregable portions that do not contain SUNSI.

The implications of excessively broad claims of SUNSI in this case impact not just the Intervenors' access to ISG-016, but, as importantly, the public's access to the adjudicatory process. This problem of denying public access was made abundantly clear at oral argument of Intervenors' seven new contentions. It originated with the Board's own action—issuing a Protective Order on July 1, 2009 that largely memorialized an agreement among the parties regarding the handling of documents related to the Applicant's submittal of its Mitigative Strategies Report. That report addressed the Applicant's efforts to comply with 10 C.F.R. §§ 50.54(hh)(2) and 52.80(d)—the regulations that concern the possibility of a loss of large areas of a nuclear power plant due to fires or explosions. The July 1, 2009 Protective Order enabled Intervenors (and their counsel and expert witnesses) to obtain these documents by executing non-disclosure affidavits restricting the handling and dissemination of the documents. Of particular relevance to our discussion here, the Mitigative Strategies Report, as well as a guidance document (NEI 06-12) on which the Applicant relied heavily in preparing its Mitigative Strategies Report, have been designated as SUNSI. The practical effect of issuing the Protective Order was to ensure that any proceedings related to these documents would be closed to the public—for were Intervenors to disclose the substance of any of such documents in a public forum, they would be in violation of the Protective Order and the non-disclosure affidavits. Accordingly, when Intervenors filed the new contentions that are the subject of this ruling today, the pleadings related to these new contentions were filed under seal in a separate docket that is not open to the public. Moreover, although the Board conducted oral argument on

November 13, 2009, for the most part, that oral argument was closed and the public shut out.<sup>53</sup>

As discussed immediately below, the public is normally to be afforded full access to all NRC proceedings involving the issuance of a license, and the extraordinary step of closure (here, to ensure that SUNSI is not disclosed to the public) should not be instituted unless a party can establish that closure is the only reasonable alternative available. Before this Board will close future proceedings in this case, the party (or parties) seeking closure must demonstrate, in accordance with the discussion below, that the need to close the hearing outweighs the strong presumption that all Licensing Board proceedings will be open to the public.

Anglo-American jurisprudence has long ensured that judicial proceedings will be open to the public.<sup>54</sup> In a 1980 decision, Richmond Newspapers v. Virginia,<sup>55</sup> the U.S. Supreme Court enunciated a constitutional basis for public access to courts, grounded in the First Amendment: “Free speech carries with it some freedom to listen.”<sup>56</sup> The First Amendment requires public access not only to criminal proceedings,<sup>57</sup> but as well both to civil trials<sup>58</sup> and to trial-type

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<sup>53</sup> On November 2, 2009, Intervenor belatedly sought to open the oral argument to the public with a “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,” filed November 2, 2009. In response, those portions of the November 13, 2009 oral argument that did not involve SUNSI were open to the public, but it was necessary to close the remainder of the oral argument to comport with the July 1, 2009 Protective Order. See Licensing Board Memorandum and Order (Protective Order Governing the Disclosure of Protected Information) (July 1, 2009) (unpublished) [hereinafter Protective Order]. The Protective Order, which all parties signed, specifies that nothing in the Protective Order “shall preclude any person from seeking public disclosure of Protected Information in accordance with NRC regulations.” Id. at 4. It also directs any party to file a motion for amendment to the Protective Order or non-disclosure affidavits should a dispute arise about the information they protect. Id. at 3. As of the issuance date of the instant Order, Intervenor has not moved to amend the Protective Order.

<sup>54</sup> Pennekamp v. Florida, 328 U.S. 331, 361 (1946) (Frankfurter, J, concurring) (“Of course trials must be public and the public have a deep interest in trials.”); (Craig v. Harney, 331 U.S. 367, 374 (1947) (“A trial is a public event. What transpires in the court room is public property.”). See also In re Oliver, 333 U.S. 257, 278 (1948); and Sheppard v. Maxwell, 384 U.S. 333, 349 (1966) (“The principle that justice cannot survive behind walls of silence has long been reflected in the ‘Anglo-American distrust for secret trials’ (citation omitted)).

<sup>55</sup> 448 U.S. 555 (1980).

<sup>56</sup> Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980).

<sup>57</sup> Id.

administrative proceedings,<sup>59</sup> such as this adjudicatory proceeding.

At the same time, however, public access to judicial proceedings is not absolute. Instead, Richmond Newspapers only creates a “presumption of openness.”<sup>60</sup> To determine whether a tribunal should block public access to a judicial proceeding, Richmond Newspapers established a two-part “experience and logic” test.<sup>61</sup> With respect to the “experience” prong, NRC licensing adjudication has always been open to the public. Long before Richmond Newspapers, the NRC’s predecessor, the Atomic Energy Commission, required that—absent compelling circumstances—adjudicatory hearings involving nuclear power plant licensing be open to the public.<sup>62</sup> That rule affording public access continues to this day.<sup>63</sup> In 2005, the

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<sup>58</sup> All Courts of Appeal confronted with this issue have recognized that the First Amendment requires a presumption of openness in civil proceedings. See Gitto Global Corp. v. Worcester Telegram & Gazette Corp., 422 F.3d 1 (1st Cir. 2005); Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110 (2d Cir. 2006); Huminski v. Corsones, 396 F.3d 53 (2d Cir. 2005); In re Cendant, 260 F.3d 183 (3d Cir. 2001); Publicker Industries, Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984); Brown & Williamson Tobacco Corp. v. Federal Trade Comm., 710 F.2d 1165 (6th Cir. 1983); Jessup v. Luther, 227 F.3d 993 (7th Cir. 2000); Grove Fresh Distrib., Inc. v. Everfresh Juice Co., 24 F.3d 893 (7th Cir. 1994); Rice v. Kempker, 374 F.3d 675 (8th Cir. 2004); Cal. First Amendment Coal. v. Woodford, 299 F.3d 868 (9th Cir. 2002); Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304 (11th Cir. 2001).

<sup>59</sup> See e.g., Detroit Free Press v. Ashcroft, 303 F.3d 681, 702 (6th Cir. 2002), holding that First Amendment required public access to deportation hearing despite government’s strenuous objections that open hearings would enable terrorists to obtain information useful to their malevolent goals. That Court noted that as long as the subject administrative proceedings “‘walk, talk, and squawk’ very much like [an Article III] judicial proceeding” they should be open to the public. Id. See also United States v. Miami Univ., 294 F.3d 797, 824 (6th Cir. 2002); Whiteland Woods, L.P. v. W. Whiteland, 193 F.3d 177, 181 (3d Cir. 1999); Soc’y of Prof’l Journalists v. Sec’y of Labor, 616 F. Supp. 569, 574 (D. Utah 1985), vacated as moot 832 F.2d 1180 (10th Cir. 1987). Although the United States Court of Appeals for the Fifth Circuit has not directly addressed this question, the United States District Court for the Southern District of Texas (where the Applicant’s proposed reactor will be sited) has recognized a First Amendment basis for public access to administrative proceedings. See Doe v. Santa Fe Independent School Dist., 933 F. Supp 647, 650 (S.D. Tex. 1996).

<sup>60</sup> Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980).

<sup>61</sup> While the term “experience and logic test” does not actually appear in Richmond Newspapers, this formulation—attributed to Richmond Newspapers—has been used in subsequent decisions involving public access to judicial proceedings. See, e.g., North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 209-220 (3d Cir. 2002); Detroit Free Press, 303 F.3d at 703.

<sup>62</sup> 27 Fed. Reg. 377 (Jan. 13, 1962) (promulgating the original public access rule (originally found at 10 C.F.R. § 2.751)).

<sup>63</sup> 10 C.F.R. § 2.328.

Commission made clear this rule is central to how business is conducted here:

The hearing process established under the Atomic Energy Act is a vehicle to permit members of the public to seek a resolution of their concerns about the health, safety, and environmental impacts of a proposed licensing action, and that process operates most fairly and effectively when those who seek to utilize it have the benefit of accurate information regarding the agency's licensing review system and its possible outcomes.<sup>64</sup>

Moreover, the public is entitled to copies of the transcripts of all Licensing Board hearings.<sup>65</sup>

Clearly, then, the NRC "experience" with adjudicatory hearings is one of openness to the public.

We turn now to the second part of the Richmond Newspapers analysis to determine the circumstances under which closure is appropriate: the "logic" portion of the test. Where an agency deems it appropriate to protect security information from being released to the public, it can certainly do so as long as it hews to its obligations under FOIA and Richmond Newspapers. As discussed previously,<sup>66</sup> the NRC has for many years placed restrictions on the disclosure of classified information and SGI, and recently, it has done so as well for SUNSI.<sup>67</sup> In doing so, the NRC has balanced the Commission's goal that proceedings related to adjudicatory hearings be open against the need for security and protection of the public health and safety. However, in the instant dispute, withholding from public access an entire document—just because it may contain some SUNSI information—fails the logic test by excluding the public from access to information that is not security-related. This is not only a misuse of the SUNSI designator, but fails the logic test of Richmond Newspapers. As the NRC's Office of the Inspector General noted in a recent semi-annual report to Congress:

OIG learned that NRC's inconsistent handling of documents considered sensitive has also created concern among some public stakeholders. Specifically, while the NRC staff will not release documents deemed as

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<sup>64</sup> CFC Logistics (Materials License), 61 NRC 45, 50 n.8 (2005).

<sup>65</sup> 10 C.F.R. § 2.327(c).

<sup>66</sup> See supra nn. 20-21 and accompanying text.

<sup>67</sup> President Obama recently addressed the continuing importance of protecting classified information and SGI in a Memorandum for the Heads of Executive Departments and Agencies. 74 Fed. Reg. at 26,277 (May 27, 2009).

sensitive to a private citizen, the staff has taken no action to restrict a citizen from obtaining the same documents from the former Local Public Document Rooms (a now-defunct NRC recordkeeping system). This inconsistency has created a perception that the NRC may be using the continued classification of a number of documents as SUNSI merely to exclude the public from participation in NRC proceedings where these documents could be referenced.<sup>68</sup>

Of particular importance to this case, when documents containing SUNSI are at issue in an adjudicatory hearing, proceedings—that would otherwise be open to the public—involving these materials will be closed in order to ensure that the SUNSI is not disclosed. However, a wholesale closure of the proceeding, effectively shutting out the public, cannot be justified under the Richmond Newspapers test as long as there is material, not properly designated as SUNSI, to which the public should have access. Under Richmond Newspapers, it is essential that such proceedings be accessible to the public and that they be closed only where specific information—legitimately designated as SUNSI—must be discussed.

<sup>68</sup> Office of the Inspector General Semiannual Report to Congress, NUREG-1415, Vol. 19, No. 2 at 25 (Mar. 2007).

#### **4. Request for Subpart G Proceeding**

Intervenors' request for a formal adjudication of their contentions pursuant to 10 C.F.R. § 2.700 is denied as moot because the seven contentions are inadmissible.

#### **Order**

For the foregoing reasons:

- A. Within 20 days of the issuance of this Order, NRC Staff shall provide Intervenors with a copy of all non-SUNSI portions of ISG-016.
- B. Within 30 days of the issuance of this Order, NRC Staff shall reevaluate Intervenors' request for access to ISG-016, using the standard for access to SUNSI in a Licensing Board proceeding articulated herein, and file a memorandum explaining its reevaluation.
- C. New Contentions 1 through 7 are inadmissible and, as such, will not be further considered in this proceeding.

The dismissal of Contentions 1 through 7 is without prejudice to Intervenors' right to file new or amended contentions based upon any information they might subsequently obtain as the result of a grant of access to material contained in ISG-016.

This Order is subject to appeal to the Commission in accordance with 10 C.F.R. § 2.311. Petitions for review meeting applicable requirements set forth in that section must be filed within ten (10) days of service of this Memorandum and Order.

<sup>157</sup> See Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Units 2 and 3), LBP-01-10, 53 NRC 273, 286-87 (2001).

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD

                  /RA/                    
Michael M. Gibson, Chairman  
ADMINISTRATIVE JUDGE

                  /RA/                    
Dr. Gary S. Arnold  
ADMINISTRATIVE JUDGE

                  /RA/                    
Dr. Randall J. Charbeneau  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
January 29, 2010

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 ORDER (RULINGS ON THE ADMISSIBILITY OF NEW CONTENTIONS AND ON INTERVENORS' CHALLENGE TO STAFF DENIAL OF DOCUMENTARY ACCESS) (LBP 10-02) 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  
ORDER (RULINGS ON THE ADMISSIBILITY OF NEW CONTENTIONS AND  
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[Original signed by Nancy Greathead]  
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Dated at Rockville, Maryland  
this 29<sup>th</sup> day of January 2010