

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)		
	)		
STP NUCLEAR OPERATING COMPANY	)	Docket No.	52-012
	)		52-013
(South Texas Project, Units 3 & 4)	)		

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NRC STAFF NOTICE OF APPEAL AND REQUEST FOR STAY OF LBP-10-02, ORDER  
(RULINGS ON THE ADMISSIBILITY OF NEW CONTENTIONS AND ON INTERVENORS'  
CHALLENGE TO STAFF DENIAL OF DOCUMENTARY ACCESS)

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Jody C. Martin  
Sara B. Kirkwood  
Counsel for NRC Staff

February 9, 2010

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NRC STAFF NOTICE OF APPEAL AND REQUEST FOR A STAY OF LBP-10-02

Pursuant to 10 C.F.R. § 2.311(a) and (c), the NRC staff files this Notice of Appeal and attached brief and Request for a Stay of the Atomic Safety and Licensing Board's January 29, 2010, Order that directed the NRC staff to provide the Intervenors with a copy of all non-sensitive unclassified non-safeguards information (SUNSI) portions of draft Interim Staff Guidance Sixteen (ISG-016) within 20 days of the issuance of the Order, to reevaluate the Intervenors' request for access to ISG-016, using the standard for access to SUNSI articulated within the Order, and to file a memorandum explaining this reevaluation with the Board within 30 days.

Respectfully submitted,

**/Signed (electronically) by/**

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**Executed in accord with 2.304(d)**

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Dated at Rockville, Maryland  
this 9th day of February, 2009

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NRC STAFF BRIEF IN SUPPORT OF APPEAL  
FROM LBP-10-02 AND REQUEST FOR STAY

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Jody C. Martin  
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Counsel for NRC Staff

February 9, 2010

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NRC STAFF BRIEF IN SUPPORT OF APPEAL OF LBP-10-02

INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(d)(2),<sup>1</sup> the staff of the U.S. Nuclear Regulatory Commission (Staff) hereby appeals the Atomic Safety and Licensing Board's (Board) decision in *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 and 4), LBP-10-02, 71 NRC \_\_ (slip op.) (January 29, 2010) ("Order").<sup>2</sup> The Order directed the Staff to redact Draft Interim Staff Guidance DC/COL-ISG-016 ("ISG-016") and provide the Intervenors<sup>3</sup> with the portions that do not contain sensitive unclassified non-safeguards information (SUNSI) within twenty days. Order at 33. The Order also directed the Staff to reevaluate the Intervenors' request for access to ISG-016, using the standard for access to SUNSI articulated within the Order, and to file a memorandum explaining this reevaluation with the Board within 30 days. *Id.* The Order should be reversed because the Board did not appropriately apply the Commission's "Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information

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<sup>1</sup> This Appeal was originally due on February 8, 2010; however, due to the closure of the Federal government, the Staff is filing it on February 9, 2010. 10 C.F.R. § 2.306.

<sup>2</sup> The Board issued a SUNSI and non-SUNSI version of its Order. The SUNSI portion of the Order discusses the admissibility of the Intervenors' seven new contentions. The Staff is not appealing this portion of the Order; thus, all references will be to the publicly available version of the Order.

<sup>3</sup> The Intervenors are the Sustainable Energy and Economic Development Coalition ("SEED"), the South Texas Association for Responsible Energy and Public Citizen.

and Safeguards Information for Contention Preparation” 74 Fed. Reg. 7,934, 7,936 (Feb. 20, 2009) (“Access Order”); and it created an incorrect standard for “need” determinations. Further, the Board exceeded its jurisdiction by instructing the Staff to redact ISG-016, using a standard that is inconsistent with the Commission’s SUNSI policy.

#### STATEMENT OF THE CASE

This proceeding involves the application by the South Texas Project Nuclear Operating Company (“STP” or “Applicant”) for a combined license (“COL”). On February 20, 2009, the Commission published in the Federal Register a Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene in this proceeding. 74 Fed. Reg. at 7,934. As part of that Notice, the Commission included an “Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation” that set forth the procedures that potential parties must use to obtain access to SUNSI and safeguards information (“SGI”). 74 Fed. Reg. at 7,936. On March 2, 2009, using the procedures set forth in the Access Order, the Intervenors (potential parties at that time) requested access to SUNSI. The Staff rejected this request on March 12, 2009, and the Intervenors appealed the denial on March 17, 2009. Thereafter, on March 27, 2009, a Licensing Board was established for the purpose of presiding over the Intervenors’ appeal. That Board (hereinafter “Access Determination Board”) affirmed the Staff’s denial of the Intervenors’ access to SUNSI, holding that the Intervenors had not demonstrated a “need” for gaining access to SUNSI. *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 and 4), LBP-09-05, 69 NRC 303, 312-314 (2009).

On June 26, 2009, the parties filed a Joint Motion for entry of a Protective Order. The Board issued the Protective Order on July 1, 2009. Pursuant to the Protective Order, the Intervenors sought access to the Applicant’s Mitigative Strategies report, required by sections 52.80(d) and 50.54(hh)(2). The Applicant transmitted this report to the Intervenors, in

accordance with the Protective Order, on July 1, 2009. The Intervenors have also been provided access to a document entitled NEI 06-12, Revision 2, in accordance with the Protective Order.

The current dispute arises from a November 5, 2009, request from the Intervenors for access to ISG-016. On November 13, 2009, the Staff denied that request. See Letter from Michael A. Spencer, Counsel for NRC staff, to Robert Eye, Counsel for Intervenors (November 16, 2009). The Intervenors appealed this decision to the Board on November 20, 2009, and the Staff responded on November 25, 2009. The Intervenors sought access to ISG-016 “because it may 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 applications.” Letter from Robert Eye, Counsel for Intervenors, to Administrative Judges Ann Marshall Young and Michael M. Gibson (November 20, 2009) at 1. The Intervenors stated 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.” *Id.*

In considering the Intervenors’ request, the Staff used the standards set forth in the Access Order and by the Access Determination Board, finding that the Intervenors had not shown a need for access to ISG-016. NRC Staff Reply to Intervenors’ Challenge of the NRC Staff’s Denial of access to SUNSI (November 25, 2009) at 3. Applying the standard from the Commission’s Access Order, the Staff found that the Intervenors “had not demonstrated 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.” *Id.* The Staff stressed that the Intervenors had not shown how access to a draft staff guidance document could help them prepare new contentions, when contentions must challenge the application. *Id.* at 4-6.

The Board rejected the Staff's analysis, holding that "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." Order at 10. The Board also directed the Staff to "segregate those paragraphs of the document that contain SUNSI from those that do not contain SUNSI" and provide the remaining portions of ISG-016 to the Intervenors. Order at 11.

#### STATEMENT OF THE ISSUES

The issues raised on appeal are what is the proper standard for granting Intervenors access to SUNSI once they have been admitted as a party, what is required by an Intervenor to show a "need" for SUNSI, and whether the Board has the authority to direct the Staff to provide the Intervenors with a redacted version of ISG-016.

#### LEGAL STANDARDS

Section 2.311(d)(2) allows the Staff to bring an interlocutory appeal to the Commission on the question of "whether the request for access to the information described in paragraph (a)(3) of this section should have been denied in whole or in part." 10 C.F.R. § 2.311(d)(2). Section 2.311(a)(3) provides that an Order of the Board can be appealed to the Commission with respect to "a request for access to [SUNSI], including, but not limited to, proprietary, confidential commercial, security-related information, and safeguards information." 10 C.F.R. § 2.311(a)(3).

On August 6, 2007, the Commission announced for public comment the availability of procedures to allow potential parties who demonstrate a legitimate need for SUNSI or SGI to enter into protective agreements prior to becoming a party in a proceeding so that they can receive relevant documents to prepare a valid contention.<sup>4</sup> After considering public comments,

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<sup>4</sup> Interlocutory Review of Rulings on Requests by Potential Parties for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information; Reopening of Public Comment (continued. . .)

the Commission finalized the procedures, responded to the public comments, and amended section 2.307.<sup>5</sup> This rulemaking delegated authority to the Secretary of the Commission to issue orders providing procedures for potential parties to gain access to SUNSI or SGI. *Id.* The Commission directed the Secretary of the Commission to issue these orders in conjunction with notices of hearing, or notices of an opportunity for hearing, for certain proceedings. *Id.* In the final rule, the Commission stated that “the issuance of these orders as part of such Federal Register notices is intended to emphasize and make clear that the procedures will be binding on the presiding officer or administrative judge or officer assigned, and on the parties and the potential parties to that proceeding.” 73 Fed. Reg. at 10,979.

The Commission’s “Procedures to Allow Potential Intervenors to Gain Access to Relevant Records that Contain Sensitive Unclassified Non-Safeguards Information or Safeguards Information” state that SUNSI includes, but is not limited to “proprietary, confidential commercial and security-related information.” Access Procedures at 1. The Access Procedures entail a “case-by-case approach for reviewing requests for access to SUNSI” and “include requiring a showing of need for the information and a reasonable likelihood of standing.” Access Procedures at 3. “The procedures reflect the longstanding practice of NRC staff access determinations in the first instance, subject to review by a presiding officer if contested.” *Id.* The Access Procedures further state that “disputes concerning the NRC staff’s

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(. . .continued)

Period and Notice of Availability of Proposed Procedures for Comment, 72 Fed. Reg. 43,569 (Aug. 6, 2007).

<sup>5</sup> Final Rule: Delegated Authority to Order Use of Procedures for Access to Certain Sensitive Unclassified Information, 73 Fed. Reg. 10,978 (Feb. 29, 2008). As noted in the Federal Register notice, the Commission’s approved procedures are available on the NRC’s public website in the Agencywide Document Access and Management System (“ADAMS”) at ML080380626 (“Access Procedures”), and the response to public comments is available in ADAMS at ML080380633.

‘need’ determination would be reviewable by . . . the presiding officer in the ongoing licensing proceeding.” Access Procedures at 7.

The Secretary of the Commission issued an Access Order with the Notice of Hearing and Opportunity to Petition for Leave to Intervene in this proceeding. 74 Fed. Reg. at 7,936. The Access Order states that requests for SUNSI must include “the identity of the individual requesting access to SUNSI and 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.” *Id.* at 7,936.

#### DISCUSSION

LBP-10-02 should be overturned because the Board misapplied the Access Order. In so doing, the Board incorrectly found that to demonstrate a “need” for ISG-016, the Intervenor did not have to show that the document is needed for a proffered contention, and that the standard for “need” in this proceeding is lower than general discovery standards found in the Federal Rules of Civil Procedure (“FRCP”). LBP-10-02 should also be overturned because the Board did not have the authority to direct the Staff to redact ISG-016 and to provide the Intervenor with all non-SUNSI portions of ISG-016.<sup>6</sup>

##### I. The Board Misapplied the Access Order

LBP-10-02 should be overturned because the Board misapplied the standards in the Access Order. The Board stated that in order for an Intervenor to obtain access to SUNSI, the Intervenor must “explain its ‘need for the information in order to meaningfully participate in this adjudicatory proceeding’” and “nothing more.” Order at 10. The Board further stated that the

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<sup>6</sup> Even if the Board had such authority, any portion marking of ISG-016 should be governed by the Commission’s SUNSI policy and not the standard provided in the Order.

Staff misapplied the Access Order because “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.” *Id.* The Board concluded that “as long as Intervenor 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”; and that “there is no basis for piling such added burdens on Intervenor to demonstrate a ‘need for SUNSI.’” *Id.* This holding is incorrect because: (1) the Board’s interpretation is inconsistent with the plain language of the Access Order; (2) the Board’s definition of “need” is inconsistent with Commission practice; and (3) even if the Access Order did not apply, strictly speaking, the standards articulated by the Order should apply.

A. The Staff applied the Access Order Correctly.

The Board contends that it is “clear that the NRC staff misapplied” the Access Order. Order at 9. Specifically, the Board found that (1) the Staff “improperly characterized Intervenor’s request for access to ISG-016” by finding that the Intervenor’s had not shown how this information was necessary to provide the basis and specificity for the Intervenor’s already filed contentions; and, (2) the Staff “imposed additional burdens on Intervenor that are not warranted under the standards for access to SUNSI.” Order at 9-10.

First, the Board stated that the Staff only analyzed Intervenor’s claims with respect to already filed contentions. Order at 9. This is incorrect. In analyzing the Intervenor’s request for ISG-016, the Staff found that the Intervenor had not demonstrated a need for the information with respect to either the Intervenor’s already submitted contentions or “for use in formulating possible new and/or amended contentions.” Letter from Michael A. Spencer, Counsel for NRC staff, to Robert Eye, Counsel for Intervenor (November 16, 2009) at 2. Specifically relating to the Intervenor’s need for ISG-016 to draft new contentions, the Staff stated that “you have not explained how a draft guidance document is necessary to form the basis and specificity for a

proffered contention.<sup>7</sup> *Id.* 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. [ISG-016] is not part of the COL application, and therefore does not, by itself, demonstrate a dispute with the Applicant.” *Id.* at 2. The Staff analyzed whether the Intervenors had demonstrated a need for ISG-016 in drafting both existing *and* new contentions, as required by the Access Order. Consequently, the Board’s claim that the Staff only analyzed the Intervenors need for ISG-06 with regard to the Intervenors’ existing contentions is incorrect.

The Board’s second concern with the Staff’s analysis was that “the Staff imposed additional burdens on Intervenors that are not warranted under the standards for access to SUNSI.” Order at 10. Specifically, the Board found that “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.” *Id.* The Board also found that “there is no basis for piling such burdens on Intervenors to demonstrate a ‘need for SUNSI.’” *Id.* This interpretation is in conflict with the plain language of the Access Order and Licensing Board precedent.

The Access Order states that requests for SUNSI must include “the identity of the individual requesting access to SUNSI and 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.*” 74 Fed. Reg. at 7,936. (emphasis added). The plain language is that

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<sup>7</sup> It is possible that there is some confusion with the term “proffered contention.” The Staff uses this term consistently, because it is the standard used in the Access Order. The Staff was not just using it to refer to already submitted contentions, but as is clear in the Staff’s paragraph analyzing whether Intervenors had shown a need for ISG-016 with regards to new contentions, the Staff also used the term to analyze new contentions.

requesters must state why publicly available versions of the *application* are insufficient to provide the basis and specificity *for a proffered contention*. This is a logical requirement, because contentions must be based on the application. To demonstrate a need for SUNSI to formulate a contention, it is logical to ask why the publicly available version of the application is insufficient.

The Board states that a 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.” Order at 10. The Board’s standard is not present in the Access Order. The Access Order states that the requester must demonstrate “why the publicly available version of the *application* would not be sufficient to provide the basis and specificity for a proffered contention.” 74 Fed. Reg. at 7,936 (emphasis added). The Access Order is silent on whether publicly available versions of the *requested document* must be present, and it never states that if a publicly available version of a document is unavailable a requester has a right to that document for reasons unrelated to contention preparation.

Further, the Order upon which this appeal is based is in conflict with the decision of the Access Determination Board. That Board denied the Intervenor’s SUNSI request because the Intervenor had not “offered a reason for needing such information material to the findings a Licensing Board must make and [did not] otherwise [explain] ‘why publicly available versions of the application would not be sufficient to provide the basis and specificity for a proffered contention.’” *South Texas Project*, LBP-09-05, 69 NRC at 312-13 (internal citations omitted). Further, the Access Determination Board held that the Intervenor “failed even to suggest the basis of a proffered contention.” *Id.* at 313. Unlike the Board here, the Access Determination Board correctly found that to demonstrate “need,” a requester must show that the requested document relates to a proffered contention.

The Staff applied the Access Determination Board's ruling, and the plain language of the Access Order in ruling on the Intervenor's November 5, 2009, request for access to ISG-016. The Staff's analysis stated that "in order to demonstrate a need for the information, the Intervenor must (1) discuss the basis for a proffered contention and (2) describe why the information available to the Intervenor is not sufficient to provide the basis and specificity for a proffered contention." Staff Reply to Intervenor's Challenge of the Staff's Denial of Access to SUNSI at 4 (citing the Access Determination Board). Using this standard, the Staff found that the Intervenor had "not demonstrated that they need [ISG-016] to provide the basis and specificity for a proffered contention." *Id.* This analysis correctly applied both the Access Order and the Access Determination Board's precedent.

The Staff correctly applied the plain language of the Access Order in denying the Intervenor's request for ISG-016. The Intervenor has not shown a need for the document to provide the basis and specificity for a proffered contention – nor have they shown why a draft staff guidance document is necessary to draft a contention. The Board erred in finding that the requirement to show that a requested document has to be directly related to an admissible contention only applies when there is a publicly available version of that document; consequently, LBP-015 should be overturned.

B. The Board's Definition of "Need" is Inconsistent with Commission Practice

After finding that a request for SUNSI does not have to relate to information needed to provide the basis for a proffered contention, the Board found that to meet the "need" requirement, Intervenor must only "show that access to ISG-016 may enable them to participate more meaningfully in this adjudicatory proceeding." Order at 10. And that "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.”* *Id.* at 11 fn.45 (emphasis added). This standard of need is inconsistent with Commission practice.

First, there is no support in the Commission’s regulations or case law for parties, or potential parties, to gain access to documents merely because they “may enable” an Intervenor to augment a pleading. This holding allows Intervenors to conduct discovery for SUNSI documents. There is a prohibition on discovery in Subpart L proceedings beyond those documents that are provided in the mandatory disclosures and the hearing file. 10 C.F.R. § 2.1203. Even in Subpart G proceedings, requests for production of documents against the Staff are limited to information that is “relevant to the proceeding.” 10 C.F.R. § 2.709(b). And if a party files a motion to compel, he or she must “set forth the relevancy of the record or document to the issues in the proceeding.” 10 C.F.R. § 2.709(d). Here, the Board is not even limiting its “need” standard to documents “relevant to the issues in the proceeding”; instead, the Board states that “because the instant dispute concerns solely whether Intervenors 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.” Order at 11 fn. 45. This reading of the Access Order makes it easier for a prospective intervenor to gain access to SUNSI than an admitted party in a Subpart G proceeding to gain access to non-SUNSI material. The Access Determination Board noted this possible improper interpretation of the Access Order and stated this issue as follows:

We recognize that a petitioner’s lack of access to SUNSI may, on occasion, hinder it to some degree in its ability to demonstrate why publicly available versions of the application would not be sufficient to provide the basis and specificity for a proffered contention” (74 Fed. Reg. at 7,937). Any such hindrance, however, does not absolve a petitioner from at least endeavoring to address this criterion. *A contrary conclusion would improperly convert the current SUNSI disclosure process from one that is based on a petitioner’s ability to show “legitimate need” (ibid.) into one where a petitioner’s broad, non-specific, and speculative assertion of “need” would mandate the wholesale release of SUNSI.* Such an outcome would not only be in derogation of the current procedural regime, it would have the perverse effect of conferring more

expansive rights on potential parties regarding access to SUNSI than on actual parties.

*South Texas Project*, LBP-09-05, 69 NRC at 313 (emphasis added). As the Access Determination Board stated, by finding that a requester must not show why SUNSI is needed to provide the basis and specificity for a new contention, the Board here is obviating the “need” requirement. Instead, under the Board’s standard, a requester can gain access to more information through the Access Order than he or she could through any of the Commission’s discovery regulations. The analysis by the Access Determination Board was correct and is consistent with the plain language of the Access Order. The Board erred by finding that Intervenor was not required to demonstrate “need” with respect to a proffered contention, and by defining “need” as something less than that required in the FRCP discovery context.

C. Even if the Access Order does not Technically Apply, the Principles Articulated by the Commission in the Access Order Should Nonetheless be Applied Here

As the Board pointed out, the Access Order may only apply to SUNSI disputes among “prospective parties” and may no longer be applicable once a Petition to Intervene has been granted. Order at 8 fn. 36. But the Board identified no reason to depart from the principles articulated in the Access Order. For several reasons, the Staff believes this procedure is the correct one to follow in circumstances where an admitted party is seeking SUNSI in order to draft new contentions.

First, the Access Order is the only Commission approved approach for adjudicating SUNSI or SGI access determinations. In deciding this dispute, the Board looked to principles from the Freedom of Information Act (“FOIA”) (Order at 4-7), section 2.390 (Order at 6-7) and the FRCP (Order 11, fn. 45). The Commission was undoubtedly aware of these other methods for determining access to SUNSI when the Commission created its Access Procedures. Instead of following FOIA or the FRCP, the Commission required requesters to demonstrate a “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.” 74 Fed. Reg. at 7,496. The Board erred by looking to FOIA and the FRCP for guidance in this dispute, because the Commission, through the Access Order, provided the procedure and principles for resolving requests for SUNSI.<sup>8</sup>

Second, it is logical to use the same approach for SUNSI requested to formulate new contentions both at the beginning of a proceeding and for new contentions throughout the proceeding. The situations are similar. In both, requesters are seeking information to formulate new arguments that cannot be made with information currently available to the party. Consequently, the need for the information is the same at the beginning of the proceeding as it is during a proceeding. Thus, the process for determining need should be the same.

Finally, the Board was concerned that the Staff – as a party in litigation – was refusing to provide the Intervenors with ISG-016. Order at 4. The Access Order, however, maintains the Staff’s traditional role of making access determinations in the first instance, subject to review by a Licensing Board. See Access Procedures at 3 (“The procedures reflect the longstanding practice of NRC staff access determinations in the first instance, subject to review by a presiding officer if contested.”); see *a/so*, Final Rule: Interlocutory Review of Rulings on Requests by Potential Parties for Access to [SUNSI] and [SGI], 73 Fed. Reg. 12,627, 12,630 (Mar. 10, 2008) (“For most SUNSI, the NRC staff’s regulatory responsibility for releasing the information only to those demonstrating need should provide sufficient assurance that favorable access determinations are sound.”). Having the Staff make access determinations regarding information needed for new contentions maintains the Staff’s traditional role of making initial

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<sup>8</sup> As discussed further below, FOIA is a distinct process from the procedures in the Access Order. For example, under FOIA, a requester only gains access to the redacted version of a document, whereas a requester that shows a need for a document under the Access Order receives the entire document.

access determinations on whether a requester has a “need” for SUNSI or a “need to know” for SGI. This also preserves the Board’s traditional role of adjudicating disputes regarding the Staff’s access determination.<sup>9</sup>

For these three reasons, even if the Access Order technically does not apply once a petition to intervene is granted, the principles articulated in the Access Order should apply throughout the proceeding.

II. The Board Cannot Direct the Staff to Provide a Redacted Version of ISG-016

The Board directed the Staff to provide a copy of all non-SUNSI portions of ISG-016 to the Intervenor within 20-days. Order at 33. The Board found that if the Staff seeks to withhold a document from a party, “NRC Staff must carry the burden of proving that the document or situation fits meets [sic] one of FOIA’s specifically enumerated exceptions.” Order at 4. After finding no statutory or regulatory definition of SUNSI, the Board found that the only FOIA exemption in the Commission’s regulations that could arguably apply is section 2.390(d). Order at 6. While the Board did not seek to directly resolve whether ISG-016 contains SUNSI, it did 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.” Order at 7, fn. 30. The Board’s analysis is incorrect because (1) the Board does not have the authority to Order the Staff to redact ISG-016; and (2) the Board ignores Commission approved definitions of SUNSI.

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<sup>9</sup> In stating its position that the Access Order should not apply in this situation, the Board notes that “for more than 50 years, Atomic Safety and Licensing Board’s 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.” Order at 9, fn. 36. However, this is not a “discovery” dispute. This is a dispute over access authorization to security sensitive material. As the Access Procedures note, the Staff has traditionally made initial decisions regarding access authorization. Procedures at 3.

A. The Board does not have Authority to Order the Staff to Redact ISG-016

As stated in section I of this Discussion, this dispute should be decided using the procedures in the Access Order. The Access Order states that if the Staff denies a request for access to SUNSI, then the requester may file a challenge to this determination with the presiding officer. 74 Fed. Reg. at 7,937. Thus, the role of the presiding officer is to determine whether the Staff correctly denied access to the Intervenor. If the Board finds that the Staff incorrectly denied access, the remedy is to instruct the Staff to turn the document over to the Intervenor under the terms of the Protective Order and non-disclosure agreement – not to order disclosure of a redacted version of the document. *Id.* Nothing in the Access Order provides the Board with the authority to direct the Staff to produce a redacted version of a SUNSI or SGI document.

Not only does the Board lack the authority to direct redaction, it certainly lacks the authority to direct redaction using a statutory scheme that is not adopted, or even referred to, in the Access Order. The Board's analysis for why redaction is appropriate comes from an analysis of the NRC's regulations implementing the FOIA. Order at 4-5. Further, the Board directs that the Staff redaction be based on the application of FOIA exemptions. *Id.* at 6. The procedure set forth in the Access Order is entirely distinct from the FOIA process. The Board is correct that if the Intervenor – or a member of the public -- filed a FOIA request, they would be entitled to the reasonably segregable portions of ISG-016. However, under the Access Order, the first question is whether the requester has shown a "need" for the document. If a need is not demonstrated, the analysis stops. Under the Access Order, the Staff does not then analyze the request under the FOIA regulations and provide a redacted version. When the Commission developed the Access Orders, it was clearly aware of FOIA and section 2.390, yet it elected not to adopt those procedures. By instructing the Staff to provide a redacted version of ISG-016,

the Board is not following the procedures set forth by the Commission – and is improperly turning requests for access to SUNSI into de facto FOIA requests.<sup>10</sup>

There are also many advantages to requesting parties following the Access Procedures as opposed to applying FOIA. First, the time periods for responses to access requests under the Access Order are shorter than the response time for FOIA requests. *Compare* Access Order at Attachment 1, 74 Fed. Reg. at 7,938, *with* 10 C.F.R. § 9.25. Second, once an Intervenor demonstrates a “need” for SUNSI, he or she is granted access under a protective order to the entire document, not just the redacted version. Further, if access is denied, the Access Procedures provide for immediate review by a Licensing Board, and through section 2.311(a), by the Commission. Therefore, while the Commission did not prescribe FOIA procedures in the Access Order, such as providing redacted versions of the document, it did provide several provisions that are more favorable than FOIA for requesters in the Access Procedures.

B. The Board’s Definition of SUNSI is not Consistent with the Commission’s

Even if the Staff were to provide Intervenors with a redacted version of ISG-016, the standard that the Board established for the redaction is inconsistent with the Commission’s definition of SUNSI. The Board stated that in order to withhold a document from the public, the “NRC Staff must carry the burden of proving that the document or situation fits meets [sic] one of FOIA’s specifically enumerated exceptions.” Order at 4. The Board found no “statutory or regulatory definition of ‘SUNSI.’” Order at 5. The Board also stated that to qualify as exempt

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<sup>10</sup> The Staff notes that responding to FOIA requests, including providing redacted versions of documents to the public, is traditionally a non-adjudicatory staff function not overseen by Boards. Indeed, NRC regulations provide an administrative procedure to appeal FOIA determinations that are inapposite to the authority of Atomic Safety Licensing Boards. See 10 C.F.R. § 9.29. To the extent that the Board is asking the Staff to treat this access determination as a FOIA request, it is outside the Board’s jurisdiction to direct the Staff in activities unrelated to adjudication. *Duke Energy Co. (Catawba Nuclear Station, Units 1 and 2)*, CLI-04-06, 59 NRC 62, 74 (Feb. 18, 2004).

from FOIA disclosure as SUNSI, a document must meet the criteria in section 2.390(d). Order at 6. The Board also noted that the NRC website states that SUNSI “encompasses a wide variety of categories (e.g., personal privacy, attorney-client privilege, confidential source, etc)” and the Board stated that “there is no legal basis for sweeping aside the well-established (and long-recognized) privileges such as the Privacy Act” and Attorney-Client Privilege. Order at 6-7, fn. 29. While the Board did not seek to directly resolve whether ISG-016 contains SUNSI, it did 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.” Order at 7, fn. 30.

The Board’s limitation of SUNSI to only “licensee or applicant data” is inconsistent with Commission policy. In its Access Procedures, the Commission defines SUNSI as “including, but not limited to, proprietary, confidential commercial, [and] security related information.” Access Procedures at 1. This same definition is used in section 2.311(a)(3). The Commission did not limit “security related information” to only Applicant developed security information.

In a staff requirements memorandum (“SRM”) dated May 7, 2004, the Commission directed the Staff to “develop guidance to ensure information that could reasonably be expected to be useful to potential adversaries is withheld from public disclosure.” SECY 04-0191 at 1. In office of the secretary paper (“SECY”) 04-0191, the Staff provided “for Commission review and approval the NRC staff’s proposed approach for determining the appropriate handling of information and more specific guidance for withholding or releasing information about nuclear power reactors.” *Id.* at 1. SECY-04-0191 explained that SUNSI would include information that does not meet the definition of SGI, yet “could reasonably be expected to be useful to a potential adversary.” *Id.*, Attachment 1 at 1. It also stated that “information obtained from *or provided to* licensees and determined to be [SUNSI] should be treated similar to commercial or financial information and withheld from public disclosure under 10 CFR 2.390.” *Id.* In the SRM

for SECY-04-0191, the Commission “approved the general framework for making decisions on withholding information that could reasonably be expected to be useful to an adversary and has approved the staff’s specific guidance provided in Attachment 1 for making such determinations for information related to nuclear power reactors.” SRM-SECY-04-0191 at 1.

In COMSECY-05-0054, the Staff circulated the results of a working group created to develop a SUNSI policy. This policy defined SUNSI as “any information of which the loss, misuse, modification, or unauthorized access can reasonably be foreseen to harm the public interest, the commercial or financial interests of the entity or individual to whom the information pertains, the conduct of NRC and Federal programs, or the personal privacy of individuals.” COMSECY-05-0054, Attachment 2 at 1. The policy organized SUNSI into seven categories: (1) allegation information, (2) investigation information, (3) security-related information, (4) proprietary information, (5) privacy act information, (6) Federal, State, foreign government, and international agency-controlled information, and (7) sensitive internal information. *Id.* The Commission disapproved this policy, calling for the Staff to create a simplified two tiered approach to SUNSI<sup>11</sup> until the Federal government developed a government-wide policy. SRM-COMSECY-05-0054 (June 29, 2006). However, the Commission stated that “while the staff develops the simplified policy, it should continue to use the SUNSI policy it has in place.” *Id.* at 1. Further, while the Commission in SRM-COMSECY-05-0054 commented on several of the items that relate to internal documents, including directing the Staff to review internal documents on a regular basis to ensure that non-SUNSI documents are released, the

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<sup>11</sup> The Commission’s direction to provide a simplified two-tiered approach to SUNSI seems at odd’s with the Board’s preference to retain traditional privileges. Order at 6-7, fn. 29. However, the Board is correct that in the event of a FOIA request, the Staff must be more specific than just stating that a document is “SUNSI” if it sought to withhold that document.

Commission did not endorse the Board's view that only documents created by an Applicant or Licensee may be withheld as SUNSI. *Id at 1-2.*

The Staff supports the view that hearings should be open and public to the extent possible. However, this goal must be balanced against the legitimate need to protect security related information. The Commission has approved classifying some Staff created documents as SUNSI. The Board's analysis of SUNSI – as excluding Staff created documents – is at odds with this Commission direction. Thus, if the Commission wishes the Staff to release a publicly available version of ISG-016, the Board's direction regarding what information should be withheld as SUNSI should be overturned, and the Staff should be directed to follow existing SUNSI policy in making any redactions.

#### CONCLUSION

The Commission should overturn LBP-10-02 because the Board misapplied the Access Order, created a standard for "need" that is inconsistent with Commission precedent, and improperly directed the Staff to redact ISG-016.

Respectfully submitted,

**Signed (electronically) by**

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Dated at Rockville, Maryland  
this 9th day of February, 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)		
	)		
STP NUCLEAR OPERATING COMPANY	)	Docket No.	52-012
	)		52-013
(South Texas Project, Units 3 & 4)	)		

REQUEST FOR STAY

Pursuant to 10 C.F.R. § 2.342, the Staff applies for a stay of the effectiveness of the January 29, 2010 Board Order. Specifically, the Staff requests a stay of the requirement to provide Intervenors with a copy of all non-SUNSI portions of ISG-016 within 20 days of the Order (February 18, 2010) and to reevaluate Intervenors' request for access to ISG-016, using the Board's standard for access within 30 days of the Order (March 1<sup>st</sup>, 2010). As further discussed below, the Staff has made a strong showing that it is likely to prevail on the merits; a failure to grant the stay will result in irreparable injury to the Staff, the granting of the stay will not harm any other party; and the public interest lies with the Staff.

The Staff has made a strong showing that it will prevail on the merits

As further discussed in the above brief in support of the Staff's appeal, the Staff has demonstrated that the Board Order was incorrectly decided. The Board incorrectly applied the Access Order, and created a new erroneous standard for "need" determinations. Moreover, the Board impermissibly instructed the Staff to redact ISG-016, using a standard that is inconsistent with the Commission's current SUNSI policy.

The Staff will be Irreparably Injured Unless a Stay is Granted

Without a stay of the Board's Order requiring the Staff to reevaluate the request for access to ISG-016 using the Board's standard, and to redact ISG-016 using the Board

standard, the Staff will be irreparably injured. This Order will require the Staff to apply a standard for release that is inconsistent with the Commission Access Order governing access to SUNSI documents, and inconsistent with the Commission's SUNSI policy. This could result in the unauthorized release of SUNSI. Once the SUNSI is provided to the Intervenors, there is no retracting it. The injury is irreparable because the documents will have been released. This type of irreparable injury is one that the Commission has previously recognized in granting interlocutory review of Board Orders requiring the Staff to release sensitive documents<sup>12</sup>. See *e.g. Duke Energy Co. (Catawba Nuclear Station, Units 1 and 2)*, CLI-04-06, 59 NRC 62, 70 (2004) (holding that immediate review of a Board Order to grant Intervenors access to SGI was immediately reviewable because "the Commission cannot later, on appeal from a final Board decision, rectify an erroneous disclosure order. A bell cannot be unrung.") (*internal citations omitted*). Because the adverse impact of that release would occur now, the alleged harm is immediate.

#### The Granting of a Stay will not Harm Other Parties

A stay of this decision pending appeal will not harm any other party. The Staff contacted the parties to obtain their position on the stay request. The Applicant has no objection to the Staff's stay request. The Intervenors are opposed to the stay request. However, the contents of ISG-016 do not relate to any currently admitted contention in the proceeding. Thus no party is harmed by a stay of the Order pending Commission review.

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<sup>12</sup> The irreparable injury standard is contained in both the Commission's interlocutory review standards and the Commission's stay standards. *Compare* 10 C.F.R. § 2.341(e)(2)(I) "Threatens the party adversely affected by it with immediate and serious irreparable impact, which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's initial decision" *with* 10 C.F.R. § 2.342(e)(2) "Whether the party will be irreparably injured unless a stay is granted."

The Public Interest Lies with the Staff

The public has a strong interest in protecting sensitive security information. On this matter the Commission has previously held:

As a policy matter, the Commission has a strong interest in limiting access to safeguards and security information. We must limit distribution of safeguards information to those having an actual and specific, rather than a perceived, need to know. Anything less would breach our duty to the public and to the nation, for the likelihood of inadvertent security breaches increases proportionally to the number of persons who possess security information, regardless of security clearances and everyone's best efforts to comply with safeguards requirements

See *Duke Energy Co.*, CLI-04-06, 59 NRC at 73. A stay of the Board Order pending Commission review will ensure that the public interest in limiting access to security information is protected.

CONCLUSION

Because the Staff is likely to prevail on the merits of its appeal; the Staff will be irreparably injured without a stay; there is no harm to any other party from granting a stay; and the public interest weighs in favor of granting a stay; the Staff application for a stay should be granted.

Respectfully submitted,

**/Signed (electronically) by/**

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Dated at Rockville, Maryland  
this 9th day of February, 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC STAFF NOTICE OF APPEAL AND REQUEST FOR A STAY OF LBP-10-02, have been served upon the following persons by Electronic Information Exchange this 9th day of February, 2010:

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