UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of
South Texas Project Nuclear Operating Co.
Application for the South Texas Project **Docket Nos. 52-012, 52-013**
Units 3 and 4
Combined Operating License **February 19, 2010**

INTERVENORS' RESPONSE BRIEF IN OPPOSITION TO STAFF'S APPEAL OF LBP-10-02

Pursuant to 10 C.F.R. § 2.311(b) the Intervenors hereby present their brief in opposition to the Staff's appeal of the ASLB Order of January 29, 2010.[1] The Board's Order directed the Staff to provide Intervenors a copy of all non-SUNSI portions of ISG-016 and to reevaluate the request for ISG-016 applying the standard for SUNSI access to SUNSI materials in a licensing proceeding and to explain the reevaluation in a memorandum to the Board.[2] Staff moved for a stay of the Board's Order and a "housekeeping" order granting such was entered on February 17, 2010.[3]

Background

Intervenors have advanced contentions regarding the Applicant's compliance with the requirements to establish effective mitigative measures to deal with the effects of fires and explosions that are of sufficient magnitude that a large loss of plant would result.[4] Intervenors initially advanced a contention based on the absence[5] of information in Applicant's Environmental Report (ER) about how it would deal with large fires and explosions.[6]

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[1] "NRC Staff Notice of Appeal and Request for Stay of LBP-10-02, Order," February 9, 2010
[2] ASLB Order, January 29, 2010, p.33. (Board Order)
[3] Order of the Secretary Issuing Housekeeping Stay, February 17, 2010
[4] 10 C.F.R. § 50.54(hh)
[5] 10 C.F.R. § 52.80(d) requires COL applications include the means to comply with 10 C.F.R. § 50.54(hh).
[6] Petition for Intervention and Request for Hearing, April 21, 2009, Contention 2, pp. 13-23

On May 26, 2009, Applicant submitted its proposed fires and explosions mitigative measures[7] to the NRC to comply with 10 C.F.R. § 52.80(d) and 10 C.F.R. § 50.54(hh). The Applicant's MSR was based primarily on an industry guidance document, NEI-06-12.[8] This guidance document has been withheld from public disclosure under 10 C.F.R. § 2.390 and has been treated as sensitive unclassified non-safeguards information or SUNSI in this proceeding.[9] In order for Intervenors to access the Applicant's MSR and NEI-06-12, the Board entered an order that imposed conditions and restrictions on access to and uses of the Applicant's MSR and "any related documents."[10] The Staff did not object to Intervenors' access to the Applicant's MSR and NEI-06-12.[11] Subsequent to access to the SUNSI designated material the Intervenors filed new contentions that were based on the Applicant's MSR and NEI-06-12.[12]

Additional guidance on 10 C.F.R. § 50.54(hh) has been developed by NRC Staff.[13] The Intervenors sought access to ISG-016 to determine, *inter alia*, whether Applicant's mitigative measures were consistent therewith.[14]Accordingly, on November 5, 2009, Intervenors made a request to Staff for access to ISG-06-12 and Staff denied the request on November 16, 2009.[15] The Intervenors timely

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[7] The Applicant's so-called "Mitigative Strategies Report" (hereinafter MSR) was withheld from public disclosure under 10 CFR 2.390. Cover letter, Scott Head to Document Control Desk, "Submittal of Mitigative Strategies Report – 10 CFR 52.80(d)." In this proceeding the MSR is being treated as a SUNSI document. Intervenors have not contested that designation.

[8] *Id.*

[9] The Intervenors have contested the propriety of designating a portion of NEI-06-12 as SUNSI. See Intervenors' "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," November 2, 2009.

[10] "This Protective Order shall govern the Petitioners' access to and use of protected information in the correspondence from STP Nuclear Operating Company to the NRC Staff dated May 26, 2009 regarding the requirements under 10 C.F.R. § 52.80(d) and 10 C.F.R. § 50.54(hh)(2) and any related documents (Protected Information). This Protective Order shall remain in effect until specifically terminated by the Atomic Safety and Licensing Board (ASLBP) or the Commission." ASLB Memorandum and Order, July 1, 2009, p. 1.

[11] Applicant likewise did not object to Intervenors' access to the Applicant's MSR and NEI 06-12.

[12] "Intervenors' 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," August 14, 2009.

[13] See 74 Fed. Reg. 13958. This guidance has been designated ISG-016.

[14] Intervenors referenced the existence of ISG-016 in "Consolidated Response to the Answers of Applicant and NRC Staff to the Intervenors' Contentions Regarding Applicant's Submittal Under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2)," September 15, 2009, p. 11, n.11.

[15] Intervenors supported the request by explaining to Staff that it had raised issues related to efficacy of the Applicant's compliance with the fires and explosions requirements in earlier filings and cited to "Intervenors'

appealed this denial to the ASLB Presiding Officer on November 20, 2009.[16] On January 29, 2010 the ASLB issued its Order that directed the Staff to provide Intervenors a copy of all non-SUNSI portions of ISG-016 and to reevaluate the request for ISG-016 applying the standard for SUNSI access to SUNSI materials in a licensing proceeding and to explain the reevaluation in a memorandum to the Board.[17] The Staff appealed that Order.[18]

Standard of Review

This appeal is about access to evidence that Intervenors have argued is relevant to contentions regarding fires and explosions regulatory requirements.[19] The ASLB has broad discretion to decide evidentiary issues and only if that discretion is abused will its decisions be reversed.[20]

Staff's Reliance on SUNSI Access Procedures Specified in 74 Fed. Reg. 7934 is Inapposite and the Board Applied the Correct Standard in Determining that ISG-016 is Subject to Disclosure

The Staff argues this appeal is controlled by the Access Order specified at 74 Fed. Reg. 7934, 7936[21] that address access to SUNSI materials.[22] However the Access Order states, "[t]his order contains instructions regarding how *potential parties* to this proceeding may request access to documents containing sensitive information."[23] The Board also noted that these procedures apply only during the interim between publication of the notice of order, etc. and determinations of petitioner standing and contention admissibility.[24]

Consolidated Response to the Answers of Applicant and NRC Staff to the Intervenors' Contentions Regarding Applicant's Submittal Under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2)" September 15, 2009, p.11, fn. 11.
[16] See Board Order, p. 3, n.13.
[17] Id. at p. 33.
[18] Staff Notice of Appeal, Feb. 9, 2010.
[19] The Board acknowledged that Intervenors sought access to ISG-016 to evaluate Applicant's compliance with the fires and explosions requirements. Board Order, p.9.
[20] *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27 (2004); *see also Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982).
[21] STP 3 & 4 Notice of Order, Hearing, and Opportunity To Petition for Leave To Intervene, February 20, 2009, referenced as the Access Order.
[22] Staff Brief, pp. 6-10.
[23] 74 Fed. Reg. 7934, 7936 (emphasis added)
[24] Order, p. 8, n.36.

Staff's disregard for the Intervenors' party status in this case and misapplication of the SUNSI access procedures has the effect of frustrating Intervenors' meaningful participation in the COLA proceedings.[25] The Intervenors have advanced arguments in contentions that question whether the Applicant's mitigative strategies are demonstrably effective and consistent with 10 C.F.R. § 50.54(hh)(2).[26] The ISG-016 purportedly addresses the Staff's evaluation of the requirements of 10 C.F.R. § 50.54(hh)(2).[27]

The Board ruled that the Intervenors are entitled to the ISG-016 on a showing that access would facilitate meaningful participation in the adjudication.[28] The Intervenors have participated extensively in this adjudication on the issue of Applicant's compliance with 10 C.F.R. § 50.54(hh)(2). But Staff's refusal to disclose ISG-016 forecloses Intervenors' ability to compare the Applicant's mitigative strategies with the Staff's guidance in ISG-016.[29] The Board observed that ISG-016 is "the most up-to-date information available regarding NRC Staff's view of what is necessary to comply with [10 C.F.R. § 50.54(hh)(2) and 52.80(d)]."[30] This is a sufficient basis for access to ISG-016 in the context of Intervenors' contentions regarding the fires and explosions regulations particularly where no privilege has been asserted.[31]

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[25] Perhaps Staff's misapplication of the Access Order is due to the relative "newness of the procedures and lack of experience in its application." Comments of Judge Baratta at 69 NRC 303, 315.

[26] See "Intervenors' 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," August 14, 2009.

[27] Board Order, p.11.

[28] Board Order, p.10. The Board reasoned that even under the provisions of the Access Order the Intervenors needed only to show that ISG-016 was needed for meaningful participation in the adjudication. The additional predicate imposed by the Staff would require Intervenors to demonstrate that ISG-016 is needed "to provide the basis and specificity for the current contentions, which have already been formulated and submitted." The Board determined Staff's position applied only when a publicly available version of a document is available (ISG-016 is not publicly available). Additionally, the Board rejected Staff's view that the requested document did not, *per se*, have to apply only to admissible contentions.

[29] The Board applied the standards under Fed. R. Civ. P. 26(b)(1) that specifies information may be subject to discovery notwithstanding that it may not be admissible evidence. Board Order, p. 11, n.45.

[30] Board Order, p.11.

[31] Moreover, because this information is necessary for Intervenors to determine if it would support further contentions or augment existing contentions the threshold for access is even less stringent than required under Fed. R. Civ. P. 26(b)(1). Id. at n.45. See also *Chowdhury v. Northwest Airlines Corp*., 226 F.R.D. 608 (N.D. Cal. 2004) that held Transportation Security Administration restrictions on access to information were based on enabling legislation and adopted regulations that created a privilege and exception to disclosure under FRCivP 26(b). Id. at 610. In the instant case, SUNSI does not have a statutory basis and lacks a definition under NRC regulations. See Board Order, p.5.

Staff relies on an earlier decision denying access to SUNSI materials because adequate cause for had not been established related to a "proffered contention."[32] The Board rejected this argument as overly restrictive and, in effect, found that Staff improperly applied SGI standards to a SUNSI issue.[33,34] Staff point to no legal authorities to support its position that the Access Order governs access to SUNSI for parties.

Staff also argues that because the Intervenors have not demonstrated a need for ISG-016 access is prohibited.[35] Intervenors have established a need for the document and such has been recognized by the Board.[36]

Staff argues that the Board's Order has obviated the "need " requirement of SUNSI access.[37] But this overlooks the Board's specific finding that Intervenors have established their need for the information to either augment extant contentions or to craft new contentions related to the fires and explosions requirements.[38] The Board's Order articulated the Intervenors' need for ISG-016 "because of the possibility that it contains information to support their challenge to the Applicants compliance" with the fires and explosions regulations. Staff does not gainsay this finding.[39]

The Staff's arguments are a not–so-thinly veiled means to preclude Intervenors from advancing contentions related to the fires and explosions regulations based on whether or not Applicant's mitigative

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[32] Staff Brief, p. 9, citing *South Texas Project*, 69 NRC 303, 312-13 (2009).
[33] Board Order, p.10-11.
[34] Staff's reliance on *South Texas Project,* 69 NRC 303, is inapposite, because the decision in this case relies on the fact that the petitioners did not have party status and were subject to the Access Order and as non-parties failed to demonstrate a need for SUNSI or explain "why publicly available versions of the application would not be sufficient to provide the basis and specificity for a proffered contention." Even if the Access Order did apply, Intervenors cannot provide this explanation, because Intervenors already have access to the non-public part of the Application that the contentions are based on and have submitted contentions regarding the Application.
[35] Staff Brief, pp.15-16.
[36] Board Order, p.11.
[37] Staff Brief, p.12.
[38] Board Order, p. 10. The Board also recognized that ISG-016 may yield additional contentions when it dismissed contentions 1-7 without prejudice and recognized Intervenors' right to file new or amended contentions based on ISG-016. Board Order, p.33.
[39] Staff repeatedly cites the Access Order's provision that requesters must state, "why publicly available versions of the application would not be sufficient to provide the basis and specificity for a proffered contention." Staff brief pp. 8-9. Even if the Access Order did apply to parties in the proceeding, this part cannot be applied to the instant case because Intervenors already have access to the non-public part of the Application (MSR). The fact that Intervenors have advanced contentions based on these non-public part of the Application is evidence that there is a need for the ISG-016 information, as well. Intervenors maintain there is no sound reason to permit access to the SUNSI designated MSR and NEI-06-12 while prohibiting access to a comparable document, ISG-016.

strategies follow ISG-016. Staff's position that Intervenors have not established a need for the ISG-016 ignores Intervenors efforts to gather information produced in this COLA related to the fires and explosions regulations. And while neither Staff nor Applicant contested Intervenors' access to NEI-06-12 and the MSR, Intervenors' attempts to access the agency guidance document ISG-016 has resulted in this appeal.

Notably absent from Staff's arguments is any indication that the ISG-016 actually contains information that would impinge on the security of any NRC licensed facility. The Staff's refusal to disclose ISG-016 is a manifestation of the very problem identified by the NRC Office of Inspector General that inconsistent handling of classified documents creates a perception that SUNSI is a Staff mechanism to preclude public participation in NRC proceedings.[40]

As noted supra, the Board reasoned that the Intervenors' access to the ISG-016 should be analyzed in the context of the COL adjudication and the principles of Federal Rule of Civil Procedure 26 and access should be even less restrictive for a litigant than a request by a non-litigant under FOIA.[41] But basic FOIA standards are a proper means to determine, for example, what redactions should be made to classified documents.[42] Staff takes the view that the Access Order trumps FOIA standards.[43] Under Staff's reasoning, withholding the entirety of a document under the Access Order is permissible even if parts of the document could be released after redactions required under FOIA.[44] The Board's search for legal standards to decide whether redactions to ISG-016 should be ordered focused on FOIA since the Access Order governs access for non-parties and does not extend to parties.[45] Reliance on FOIA principles related to redactions of classified information was reasonable because of the inapplicability of the Access Order.[46]

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[40] Board Order, pp.16-17 referencing OIG Semiannual Report to Congress, NUREG-1515, Vol.19, No.2, p.25 (March 2007).
[41] Board Order, p.4.
[42] Board Order, p. 11, n.46.
[43] Staff Brief, pp. 15-16.
[44] Staff Brief, pp.15-16.
[45] Board Order, pp. 4-5
[46] Intervenors do not waive their right to contest any redactions to ISG-016 that may be done in the future by Staff.

Additionally, the Board's Order recognized the need to balance valid security concerns with the public's right to participate in NRC proceedings. The Board's concern with the Staff's overly broad interpretation of SUNSI restrictions prompted an admonishment that future attempts to restrict public access to licensing proceedings must be accompanied by a showing that the need for restrictions outweighs the "strong presumption that all licensing proceedings will be open to the public."[47]

The Staff's refusal to apply FOIA authorized redactions is premised on the Access Order's applicability to Intervenors even though the order is specifically limited to non-parties.[48] This assumption is dubious. First, it ignores the expressed limitations of the reach of the Access Order to non-parties. Second, it disregards the Intervenors' status as parties. Third, applying Staff's logic would mean that Intervenors should make information requests under FOIA and use the information to develop contentions. In the instant case such would have caused Intervenors to forego altogether any use of SUNSI related guidance documents related to the fires and explosions regulations because the very existence of these documents was not made apparent until after the deadline for petitions for intervention.

Staff argues alternatively that even if the Access Order does not control the outcome of this dispute the standards and practices embodied therein should still apply.[49] Intervenors disagree with this approach. First, the determination of whether to produce a requested document in litigation should not rest with the Staff absent an assertion of a recognized privilege. Second, under the Access Order, the Staff makes a determination of whether the Intervenors have a need for the document. This puts Intervenors at a disadvantage because, based on this case, the Staff has an unreasonable view about what constitutes a justifiable need. As argued above, the Staff's determination of need is more akin to a determination of relevancy rather than whether a document may lead to relevant and admissible evidence.[50] Third, any advantage in a shorter response time under the Access Order is offset by the delays occasioned by engaging in motion practice and/or appeals over Staff's needlessly restrictive stance regarding whether

[47] Board Order, pp.13-17.
[48] Board Order, p. 7
[49] Staff Brief, p.16.
[50] Fed. R. Civ. P. 26(b)(1)

Intervenors need a SUNSI related document. Finally, Staff suggests that obtaining documents under the Access Order allows the entire document to be produced rather than a redacted version.[51] But Staff has not produced ISG-016 in any form, redacted or otherwise, and if redactions are required such would be consistent with recognized privileges. Production of ISG-016 with redactions based on recognized and properly applied privileges is preferable to not having the document at all.

The ASLB Properly Exercised its Jurisdiction in its Order to Staff to Redact ISG-016 Consistent with FOIA

Staff argues that it should not be required to conduct a paragraph-by-paragraph review of the SUNSI material and redact information not subject to disclosure[52] as ordered by the Board.[53] First, the Staff cites no authority for the assertion that the ASLB lacks authority to order a paragraph-by paragraph review of ISG-016. Second, ASLB panels are empowered with broad discretion to deal with procedural issues and evidence issues.[54] Third, FOIA standards have been adopted by the NRC and requiring Staff to comply with such is not an abuse of ASLB discretion.[55]

The Board's Order to conduct a paragraph-by-paragraph review also was required by the President's policy on Classified Information and Uncontrolled Unclassified Information.[56] Under that policy the Staff requires a compelling need to restrict disclosure. Staff makes no such argument. Adopting Staff's position would contradict the purpose of the President's policy to avoid over classification of documents. Finally, if government is to function with "unprecedented openness" Staff must not be permitted to use SUNSI to unjustifiably limit the public's participation in NRC proceedings.[57]

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[51] Staff Brief, p.16.
[52] Staff Brief, pp. 15-16
[53] Board Order, pp.11-13.
[54] *e.g.*10 CFR 2.319(h). See also *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27 (2004); *see also Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982).
[55] The NRC has incorporated FOIA exemptions into its rules. *In the Matter of Consumers Power Company* (Palisades Nuclear Power Facility), 12 NRC117,121,(1980).
[56] 74 Fed. Reg. 26,277 (May 27, 2009). Board Order, p.12.
[57] *Id.*

The Staff also takes issue with the Board's determination that "Staff's designation of its own material as SUNSI is inconsistent with SUNSI's purported objective of protecting licensee or applicant data."[58] This is a distinction without any legal difference as far as Intervenors' interests are concerned. It is the information related to Staff's interpretation of and Applicant's compliance with the fires and explosions regulations that Intervenors seek, irrespective of whether the SUNSI label applies.

Conclusion

Intervenors urge that the Board's Order directing Staff to disclose non-SUNSI portions of ISG-016 and reevaluate its position regarding the Intervenors' request for access to ISG-016 be affirmed.

Respectfully submitted,

/s/ Robert. V. Eye
Robert V. Eye, Kan. Sup. Ct. No.10689
Kauffman & Eye
Suite 202
112 SW6th Ave.
Topeka, Kansas 66603
785-234-4040
bob@kauffmaneye.com

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[58] Staff brief, p.17 and Board Order, p. 7.

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2010 a copy of "Intervenors' Response Brief in Opposition to Staff's Appeal of LBP-10-02 " was served by the Electronic Information Exchange on the following recipients:

Administrative Judge
Michael M. Gibson, Chair
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: mmg3@nrc.gov

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

Administrative Judge
Dr. Gary S. Arnold
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: gxa1@nrc.gov

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
Michael Spencer, Sara Kirkwood,
Jessica Bielecki, Anthony Wilson
E-mail: Michael.Spencer@nrc.gov
Sara.Kirkwood@nrc.gov
Jessica.Bielecki@nrc.gov
Anthony.Wilson@nrc.gov

Office of the Secretary
U.S. Nuclear Regulatory Commission
Rulemakings and Adjudications Staff
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

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

Counsel for STP Nuclear Operating Company
Steven P. Frantz
Stephen J. Burdick
Alvin Gutterman
John E. Matthews
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: sfrantz@morganlewis.com
sburdick@morganlewis.com
agutterman@morganlewis.com
jmatthews@morganlewis.com

Signed (electronically) by Robert V. Eye

Robert V. Eye
Counsel for the Intervenors
Kauffman & Eye
112 SW 6th Ave., Suite 202
Topeka, KS 66603
E-mail: bob@kauffmaneye.com