

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
LUMINANT GENERATION CO. LLC) Docket No. 52-034
) 52-035
(Comanche Peak Nuclear Power Plant,)
Units 3 & 4)

NRC STAFF NOTICE OF APPEAL AND REQUEST FOR STAY OF SECTIONS IV and V.B OF
LBP-10-05, ORDER (RULING ON INTERVENORS' ACCESS TO ISG-016)

Christopher C. Hair
Counsel for NRC Staff

March 22, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)		
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LUMINANT GENERATION CO. LLC)	Docket No.	52-034
)		52-035
(Comanche Peak Nuclear Power Plant,)		
Units 3 & 4))		

NRC STAFF NOTICE OF APPEAL AND REQUEST FOR A STAY OF LBP-10-05

Pursuant to 10 C.F.R. § 2.311(a) and (d)(2), the NRC staff files this Notice of Appeal and supporting brief, and, pursuant to 10 C.F.R. § 2.342, the attached Request for Stay of the Atomic Safety and Licensing Board's decision, in Sections IV and V.B. of its March 11, 2010, Order, to direct the NRC staff to provide the Intervenor with a copy of Draft Interim Staff Guidance DC/COL-ISG-016 (ISG-016).

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 22nd day of March, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)		
)		
LUMINANT GENERATION CO. LLC)	Docket No.	52-034
)		52-035
(South Texas Project, Units 3 & 4))		

NRC STAFF BRIEF IN SUPPORT OF APPEAL
FROM LBP-10-05 AND REQUEST FOR STAY

Christopher C. Hair
Counsel for NRC Staff

March 22, 2010

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NRC STAFF BRIEF IN SUPPORT OF APPEAL OF LBP-10-05

INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(a) and 2.311(d)(2), the staff of the U.S. Nuclear Regulatory Commission (Staff) hereby appeals Sections IV and V.B. of the Atomic Safety and Licensing Board’s (Board) decision in *Luminant Generation Co.* (Comanche Peak Units 3 and 4), LBP-10-05, 71 NRC __ (Mar. 11, 2010) (slip op.) (“Order”),¹ directing the Staff to provide Draft Interim Staff Guidance DC/COL-ISG-016 (“ISG-016”) to the Intervenors.² Order at 73. The Order should be reversed because the Board misconstrued the Commission’s “Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation,” 74 Fed. Reg. 6177, 6,179 (Feb. 5, 2009)

¹ The Board issued public and non-public versions of its Order. The non-public version of the Order explains the Board’s rulings on the admissibility of the Intervenors’ five new contentions on the Applicant’s Mitigative Strategy Report. The Staff is not appealing this portion of the Order. All references in this appeal will be to the non-public version of the Order.

² The Intervenors are the Sustainable Energy and Economic Development Coalition (SEED), Public Citizen, True Cost of Nukes, and Texas State Representative Lon Burnam.

(Access Order) and created an incorrect standard for “need” determinations under the Access Order.

STATEMENT OF THE CASE

This proceeding involves the application filed September 19, 2008, by Luminant Generation Company LLC (Luminant or Applicant), pursuant to the Atomic Energy Act of 1954, as amended (AEA) for combined licenses (COLs) for two US-Advanced Pressurized Water Reactors (US-APWRs), to be located adjacent to the existing Comanche Peak Nuclear Power Plant, Units 1 and 2, near Glen Rose in Somervell County, Texas (Application). On February 5, 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. 6177, 6179. 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 Sensitive Unclassified Non-Safeguards Information (SUNSI) and safeguards information (SGI). *Id.* at 6179. On April 6, 2009, the Intervenors submitted a petition to intervene in the Comanche Peak COL proceeding.³ By Order dated August 6, 2009, the Board admitted two of the Intervenors’ contentions and granted the hearing request. *Luminant Generation Co.* (Comanche Peak Units 3 and 4), LPB-09-17, 69 NRC __ (Aug. 6, 2009) (slip op.).

On June 5, 2009, the Intervenors requested access to the Applicant’s Mitigative Strategies report, required by 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2), which was designated by the Applicant as containing security-related information. On June 15, 2009, the Staff agreed to

³ The Staff and Applicant submitted timely answers to the petition on May 1, 2009. The Petitioners timely replied on May 8, 2009.

grant Intervenors' access to the document, and on June 30, 2009, the parties filed a Joint Motion for Entry of a Protective Order. Accordingly, the Board issued the Protective Order on July 1, 2009. On August 10, 2009, the Intervenors submitted five contentions challenging the Applicant's compliance with 10 C.F.R. §§ 50.54(hh)(2) and 52.80. "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" (Mitigative Strategies Contentions). Oral argument on these contentions was held on November 12, 2009.⁴

The current dispute arises from the Intervenors' November 5, 2009 request for access to Draft Interim Staff Guidance DC/COL-ISG-016 (ISG-016).⁵ Because this draft guidance document contains security-related information, it is not available to the public. The Staff denied the Intervenors' Access Request on November 16, 2009. Letter from Susan H. Vrahoretis, Counsel for NRC Staff, to Robert Eye, Counsel for Intervenors (Nov. 16, 2009) (Staff's SUNSI Denial).⁶ The Staff applied the Commission's Access Order and found that the Intervenors did not explain how ISG-016 related to the Intervenors' existing filed contentions, or new unspecified contentions the Intervenors did not proffer. *Id.*

The Intervenors challenged this determination on November 20, 2009. Letter from Robert V. Eye, Counsel to Intervenors, to Administrative Judge Ann Marshall Young (Nov. 20,

⁴ The Board dismissed all of these contentions for failure to meet the requirements in 10 C.F.R. § 2.309(f)(1), and also dismissed as moot a related contention from the original petition that the Board had reserved ruling on. Order at 73.

⁵ Email from Robert V. Eye to Susan Vrahoretis et al., Re: SUNSI request/ ISG 06-12 [sic] (Nov. 5, 2009) [hereinafter Intervenors' SUNSI Request to Staff]. Intervenors' counsel subsequently amended the request to correct the reference, indicating that the "request is for ISG 0-16 not ISG 06-12." Email from Robert V. Eye to Susan Vrahoretis et al., Re: Amended request for ISG 06-12 [sic] (Nov. 9, 2009).

⁶ Letter from Susan Vrahoretis to Robert Eye, 11/5/2009, Request for Sensitive Unclassified Non-Safeguards Information, 11/5/2009 Amended Request for Sensitive Unclassified Non-Safeguards Information and 11/9/2009 Amended Request for Sensitive Unclassified Non-Safeguards Information (Nov. 16, 2009) (ADAMS Accession No. ML093200712).

2009) (Intervenors' SUNSI Appeal). The NRC Staff reaffirmed its denial of access to draft ISG-016 on the basis that the Intervenors had not met the standards for access set forth in the Access Order. See NRC Staff's Reply to Intervenors' Challenge of the NRC Staff's Denial of Access to SUNSI (Nov. 25, 2009) (NRC Staff's Reply). The Board rejected the Staff's analysis, holding that the Intervenors had met the standards in the Commission's Access Order and ordered the Staff to provide the Intervenors with access to ISG-016. Order at 70.

STATEMENT OF THE ISSUE

The issue raised on appeal is what is the proper standard under the Commission's Access Order for granting access to SUNSI, specifically what is required by a requester to show a "need" for SUNSI.

LEGAL STANDARDS

10 C.F.R. § 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.⁷ After considering public comments, the Commission finalized the procedures, responded to the public comments, and amended 10 C.F.R. § 2.307.⁸ 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.” *Id.* 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.*

⁷ Interlocutory Review of Rulings on Requests by Potential Parties for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information; Reopening of Public Comment Period and Notice of Availability of Proposed Procedures for Comment, 72 Fed. Reg. 43,569 (Aug. 6, 2007).

⁸ 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.

The Access Procedures further state that “disputes concerning the NRC staff’s ‘need’ determination would be reviewable by . . . the presiding officer in the ongoing licensing proceeding.” *Id.* 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 6179. 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 6179.

DISCUSSION

Sections IV and V.B. of LBP-10-05 should be overturned because, in directing the staff to provide the Intervenors with ISG-016, the Board misconstrued the principles articulated by the Commission in the Access Order. At the outset, the Board stated it approaches “the question of whether Intervenors should be granted access to ISG-016 by considering, as the Staff did, whether Intervenors have shown that they need the document in order to participate meaningfully in the proceeding” Order at 69. The Board held that the Intervenors met the requirements of the Access Order and granted the Intervenors’ request for access to ISG-016. *Id.* at 70. This holding is incorrect because the Board erroneously applied the Commission’s Access Order to extend beyond the Intervenors’ need for SUNSI to formulate contentions.

I. The Commission’s Access Order Applies Exclusively to the Formulation of Contentions

In applying the Commission’s Access Order, the Board held that the appropriate consideration was whether the Intervenors have shown they need the document in order to participate meaningfully in the proceeding. Order at 72. In evaluating whether the Intervenors

met the requirements of the Commission's Access Order for access to SUNSI, the Board considered four factors. First, the Board acknowledged that the "Intervenors noted the expected issuance of the document and informed the Board and other parties about it in their September 2009 Reply on the current contentions." *Id.* Second, the Board noted that the Intervenors followed the progress of ISG-016, and "requested access to it within a reasonable time after it was issued." *Id.* at 72-73. Third, the Board stated that the Intervenors had "shown its relevance to matters at issue in the proceeding relating to the requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2)" Finally, the Board found that the Intervenors "have an expert who can provide support for any new contentions relating to these requirements and to any provisions of ISG-016." *Id.* at 73.

The Board's articulation of the appropriate standard and analysis, however, is inconsistent with the language of the Commission's Access Order. 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 6179 (emphasis added). Therefore, the language of the Access Order makes it clear that its provisions are limited to information that is necessary to formulate contentions.

A. The Staff Correctly Applied the Access Order

The NRC Staff correctly applied the Commission's Access Order with respect to the Intervenors' request for access to SUNSI, and followed the appropriate standards to be applied to requests for SUNSI, as articulated in *South Texas Project Nuclear Operating Co.* (Units 3 and 4), LBP-09-5, 69 NRC 303, 308, 312-13 (2009). In *South Texas*, the Board stated a request for SUNSI must demonstrate a (1) likelihood of standing, and (2) that the Intervenors have a need for SUNSI. *Id.* at 310. The *South Texas* Board stated that, in order to demonstrate a need for

SUNSI, 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 of a proffered contention. *Id.* at 312-13. Also, the *South Texas* Board stated that the Intervenor “need only show why the publicly available information in the application is not sufficient to support the basis and specificity of a proffered contention.” *Id.* at 313.

Relying on the language of the Access Order and *South Texas* decision, the Staff found that the Intervenor had failed to demonstrate why the information already available to the Intervenor was insufficient to form the basis and specificity for a proffered contention. NRC Staff Reply at 3. The Staff noted that the Intervenor had already proven themselves able to submit contentions based on information available to them. *Id.* at 4. Because ISG-016 is a draft guidance document and not part of the Application, the Staff found that the Intervenor had not provided sufficient information to demonstrate a dispute with the application.⁹ *Id.* at 5. In addition, the Staff found that the Intervenor had failed to provide a minimal description of a proffered contention. *Id.* at 4.

In its initial denial of the Intervenor’s SUNSI request, the Staff explicitly stated that the Intervenor had failed to address the Access Order’s requirements regarding proffered contentions. See Staff’s SUNSI denial at 2 (“[The Intervenor] have not explained how a draft guidance document is necessary to form the basis and specificity for a proffered contention.”). The Staff further noted that the Intervenor had failed to demonstrate why the publicly available versions of the Application and the nonpublic information already provided to the Intervenor are insufficient to form the basis and specificity for the Intervenor already proffered contentions. *Id.* The Staff concluded that the Intervenor’s “broad request for SUNSI that may have a bearing on

⁹ In other words, an ISG by itself could not be the basis for an admissible contention.

the Intervenor's unspecified new or amended contentions does not provide sufficient information to determine that [the Intervenor] have demonstrated a need for SUNSI access. *Id.* at 3. Accordingly, the Staff's denial of the Intervenor's request was appropriate.

B. The Board Misconstrued the Access Order's Requirement of Need

The Board's finding that the Intervenor need access to ISG-016 to meaningfully participate in this proceeding is inconsistent with the principles articulated in the Access Order. The Access Order states that requests for SUNSI must show a need for the information in order to meaningfully participate in the 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 6179 (emphasis added). As required by 10 C.F.R. § 2.309(f)(1)(vi), contentions must be based on the application and must provide sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact. ISG-016 is draft Staff guidance and not part of the Application. The Board's Order stated that "where there is in fact expert support, a guidance document may well be part of the support for a contention." Order at 70. Also, the Board found it significant that the Intervenor had the support of an expert. *Id.* at 70. The Staff agrees that under some circumstances guidance documents may provide support for a contention; however, this fact alone does not demonstrate the requisite need for access to that document. The Staff notes that the Commission's Access Order does not require the Intervenor to have an expert witness in order to access SUNSI.¹⁰ Moreover, while an expert witness could certainly provide factual support for a proffered contention, this does not substitute for the legal requirement that a contention be based on the application. Therefore,

¹⁰ The Access Order does require that the proposed recipient for SGI (not SUNSI) to have the technical competence to evaluate and use the specific SGI request in the proceeding. 74 Fed. Reg. 6179.

where the Intervenor's have not described a proffered contention, the Board's consideration of the Intervenor's' access to an expert witness was not relevant to the issue of whether they have demonstrated a need for ISG-016.¹¹

In applying the need standard of the Commission's Access Order, the Board considered the relevance of ISG-016 regarding the requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2). Order at 70. The Board stated that ISG-016 "may be accorded a level of consideration, or even persuasiveness, appropriate to its contents." *Id.* The Staff does not dispute this statement. Certainly, ISG-016 could provide factual support to potential contentions or aid in the legal interpretation of the Commission's regulations. However, ISG-016 does not, standing alone, provide the legal basis for a potential contention. The Staff notes that the Board's Order in this proceeding dismissed the Intervenor's' contentions relating to the Applicant's Mitigative Strategies Report for not meeting the requirements of 10 C.F.R. § 2.309(f)(1). Order at 73. Here, the Intervenor's simply have not described a potential contention. As discussed above, the Access Order's requisite need for the information in order to meaningfully participate in the adjudicatory proceeding relates to contention formulation. Therefore, the Board erred in finding a need for SUNSI.

¹¹ The Staff agrees with the Board that this demonstration of need is not burdensome. The Board's Order stated that the standard of the Commission's Access Order "is a fairly generic one" and "is not an onerous standard on its face." Order at 70. The Staff agrees with this statement. As previously discussed, the Board stated that, in order to show need, the Intervenor's "need only show why the publicly available information in the application is not sufficient to support the basis and specificity of a proffered contention." *Id.* at 313. In denying the Intervenor's request, the Staff, following the Board's holding in *South Texas*, noted that the Intervenor's had not provided a description of any proffered contentions, and had not demonstrated that the information available to them is insufficient to support a proffered contention. NRC Staff Reply at 3-4. Contrary to the Board's statement in its decision, the Staff did not assert that the Intervenor's must provide information necessary to *support* a contention. See Order at 71 (noting that the *South Texas* Board dismissed such an argument). Indeed, a minimal description of a proffered contention would suffice under the Access Order.

C. The Board's Order Erroneously Allows Greater SUNSI Access to Admitted Parties

The Board's Order misconstrues the Commission's Access Order to apply differently to parties and non-parties to the proceeding. The Board noted that the Access Order is directed to "potential parties", which the Access Order defines as "any person who intends or may intend to participate as a party by demonstrating standing and the filing of an admissible contention under 10 C.F.R. § 2.309." Order at 69. The Board noted that the Intervenors are no longer "potential parties", as they are already parties in the proceeding. *Id.* Therefore, according to the Board, the Intervenors "are in a different position than 'potential parties.'" *Id.* at 72 n.304.

The Board's distinction between "potential parties" and "actual parties" is not consistent with the principles articulated by the Commission in the Access Order. As discussed above, the Access Order provides a process whereby requestors can gain access to SUNSI in order to formulate contentions. It is, therefore, 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. In both situations, the requestors are seeking information to formulate new contentions that purportedly cannot be made with information currently available to them. Consequently, demonstrating need for the information is the same at the beginning of the proceeding as it is during the proceeding. Thus, the process for determining need should be the same. Since the process of formulating contentions is the same for parties as it is for those seeking party status, the Order articulated no reason to treat a potential party differently from an actual party regarding access to SUNSI under the Access Order. The Staff correctly applied the Access Order by considering how the Intervenors' request for SUNSI would aid their submission of new contentions, regardless of the fact that they have already gained party status.¹² See

¹² Indeed, the Board's construction of the Access Order would result in the creation of a discovery process not provided by the regulations. Specifically, the Board's Order found that the Intervenors had (continued. . .)

NRC Staff's Reply at 4-5. In this proceeding, it appears that the Board did not evaluate the critical consideration: whether the Intervenors demonstrated a need for ISG-016 with respect to formulating potential contentions.

CONCLUSION

The Commission should overturn LBP-10-05 because the Board erroneously applied the Commission's Access Order to extend beyond the Intervenors' need for SUNSI to formulate contentions, misconstrued the Access Order's requirement for need, and improperly directed the Staff to provide the Intervenors with ISG-016.

Respectfully submitted,

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Dated at Rockville, Maryland
this 22nd day of March 2010

(. . .continued)

demonstrated the requisite need for SUNSI because ISG-016 "is relevant and material to the pending fires and explosions contentions because it has a direct bearing on whether the Applicants' [sic] submittals are consistent with the Staff's interpretation of the requirements under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.43(hh)(2)." Order at 66 (citing Intervenors SUNSI Appeal at 1). This conclusion of the Board would entitle Intervenors to access SUNSI without regard to need associated with the formulation of contentions. The Board's broad application of access to SUNSI is more akin in principle to traditional discovery than the requirements articulated in the Commission's Order on SUNSI access. However, discovery is the process by which parties in a proceeding to request may obtain access to any nonprivileged information that is relevant to any party's existing claim. See Fed. R. Civ. P. 26(b)(1). Discovery in a subpart L proceeding is limited to documents provided in the mandatory disclosures and the hearing file. 10 C.F.R. §§ 2.336; 2.1203.

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REQUEST FOR STAY

Pursuant to 10 C.F.R. § 2.342, the Staff applies for a stay of the effectiveness of the March 11, 2010 Board Order. Specifically, the Staff requests a stay of the requirement to provide Intervenors with a copy of ISG-016 “in the same manner that Applicant’s Report and NEI-06-12 have been provided to them, with the same conditions applied.” Order at 73. The Staff recognizes its duty to expeditiously provide the Intervenors with access to ISG-016, but is requesting this stay in order to protect security-related information under the Commission’s Access Order. 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 erroneously applied the Commission’s Access Order to extend beyond the Intervenors need for SUNSI to formulate contentions, and misconstrued the Access Order’s requirement of need.

The Staff will be Irreparably Injured Unless a Stay is Granted

Without a stay of the Board's Order requiring the Staff to provide the Intervenor with ISG-016, 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. This could result in the unauthorized release of SUNSI. Once the SUNSI is provided to the Intervenor, 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.¹³ See e.g. *Duke Energy Co. (Catawba Nuclear Station, Units 1 and 2)*, CLI-04-06, 59 NRC 62, 70 (Feb. 18, 2004) (holding that immediate review of a Board Order to grant Intervenor 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.

¹³ 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 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, as the contents of ISG-016 do not relate to any currently admitted contention in the proceeding, no party is harmed by a stay of the Order pending Commission review.

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. While the Staff recognizes that SUNSI is not security information, the Staff believes that the public has a similar interest in protecting against the inadvertent release of security-related information, such as SUNSI. A stay of the Board Order pending Commission review will ensure that the public interest in limiting access to security-related 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
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CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC STAFF NOTICE OF APPEAL AND REQUEST FOR STAY OF LBP-10-05, have been served upon the following persons by Electronic Information Exchange this 22nd day of March, 2010:

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Dated at Rockville, Maryland
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