

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

**In the Matter of
Luminant Generation Company, LLC
Comanche Peak Nuclear Power Plant
Units 3 and 4
Combined License Adjudication**

Docket Nos. 52-034 and 52-035

April 1, 2010

**INTERVENORS' RESPONSE BRIEF IN OPPOSITION
TO STAFF'S APPEAL OF LBP-10-05, SECTIONS IV AND V.B.**

Introduction

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 March 11, 2010, LBP-10-05, Sections, IV and V.B.¹ The Order reversed the Staff's decision to deny Intervenors' access to the document in question, ISG-016.²

In this appeal the Staff argues that its interpretation of the rules that apply to SUNSI access is correct and the Board's interpretation is wrong. Staff further argues that Intervenors have not made a case for a "need" to access ISG-016. Finally, the Staff maintains that the Order allows greater SUNSI access to Intervenors *qua* parties than specified in the Federal Register Notice SUNSI access provisions.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.^{4,5} Intervenors initially advanced a

¹ Intervenors will reference the public version of the Board's March 11, 2010 Order.

² Intervenors have also opposed the Staff's appeal of the decision in South Texas Nuclear Project Units 3 & 4, LBP10-02, that addressed the Intervenors' request for access to ISG-016. Further, Intervenors are also seeking access to ISG-016 under FOIA. See attached FOIA request.

³ 74 Fed. Reg. 7934, 7936, STP 3 & 4 Notice of Order, Hearing, and Opportunity To Petition for Leave To Intervene, February 20, 2009, also referenced as the Access Order.

⁴ "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 10, 2009.

contention based on the absence of information in Applicant's Environmental Report (ER) about how it would deal with large fires and explosions.^{6,7}

On May 22, 2009, Applicant submitted its proposed fires and explosions mitigative measures to the NRC to comply with 10 C.F.R. § 52.80(d) and 10 C.F.R. § 50.54(hh).⁸ The Applicant's MSR was based primarily on an industry guidance document, NEI-06-12.⁹ 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.¹⁰ In order for Intervenor 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."¹¹ The Staff nor Applicant objected to Intervenor's access to the Applicant's MSR and NEI-06-12.¹² Subsequent to access to the SUNSI designated material the Intervenor filed new contentions that were based on the Applicant's MSR and NEI-06-12.¹³

At issue here is the additional guidance on 10 C.F.R. § 50.54(hh) has been developed by NRC Staff and is designated as ISG-016.¹⁴ The Intervenor sought access to ISG-016 to determine, *inter alia*, whether Applicant's mitigative measures were consistent therewith. Accordingly, on November 5, 2009,

⁵ 10 C.F.R. § 50.54(hh)

⁶ 10 C.F.R. § 52.80(d) requires COL applications include the means to comply with 10 C.F.R. § 50.54(hh).

⁷ Petition for Intervention and Request for Hearing, April 6, 2009, Contention 7, pp. 22-26.

⁸ The Applicant's so-called "Mitigative Strategies Report" (hereinafter MSR) was withheld from public disclosure under 10 CFR 2.390. Cover letter, Rafael Flores to Document Control Desk, "Comanche Peak Nuclear Power Plant, Units 3 and 4, Docket Numbers 52-034 and 52-035, Mitigative Strategies Report," May 22, 2009. In this proceeding the MSR is being treated as a SUNSI document. Intervenor has not contested that designation.

⁹ *Id.*

¹⁰ The Intervenor has contested the propriety of designating a portion of NEI-06-12 as SUNSI. See Intervenor's "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. This motion was denied "to the extent that argument on the contentions relating to Applicant's SUNSI Report was held in closed session." Board Order at p. 8. The Board did not rule, however, on public access to the legal pleadings and guidance regarding 10 C.F.R. § 52.80(d) and 10 C.F.R. § 50.54(hh)(2).

¹¹ "This Protective Order shall govern the Petitioner's access to and use of protected information in the correspondence from the Applicant to the NRC Staff dated May 22, 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 Licensing Board or the Commission." ASLB Memorandum and Order, July 1, 2009, p. 1.

¹² Applicant likewise did not object to Intervenor's access to the Applicant's MSR and NEI 06-12.

¹³ "Intervenor's Contentions Regarding Applicant's Submittal Under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2) and Request for Subpart G Hearing," August 10, 2009.

¹⁴ See 74 Fed. Reg. 13958.

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 appealed this denial to the ASLB Presiding Officer on November 20, 2009.¹⁶ On March 11, 2010 the ASLB issued its Order that directed the Staff to provide Intervenors ISG-016.¹⁷ The Staff has 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 Questions of law are reviewed *de novo*.²¹

The Intervenors Have Established a Need for Access to ISG-016 Based on Their Focus on Applicant's Compliance with 10 C.F.R. § 50.54(hh)(2).

At the center of this appeal is whether the Intervenors have demonstrated a need for ISG-016 in order to meaningfully participate in this proceeding.²² The Staff argues that the Intervenors are required to discuss the basis for a proffered contention and why information already available is inadequate for this

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' 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 11, 2009, p.11, fn. 8 and p.12.

¹⁶ See Board Order, p. 9

¹⁷ Board Order, p. 22.

¹⁸ Staff Notice of Appeal, March 22, 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.19.

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 *In the Matter of Amergen Energy Co., LLC* (Oyster Creek License Renewal), 69 N.R.C. 235, 259 (2009)

²² The Board held that "[A] party requesting access to a document withheld as SUNSI (or as protected under 10 C.F.R. § 2.390(d)(1)307) must, in the event no protective order addresses the matter and/or in the event of a dispute concerning such access, show that it needs the document in order to participate meaningfully in the proceeding." Order at p. 21.

purpose.²³ The Board's Order found that based on the record of Intervenor's development of contentions and related efforts concerning Applicant's compliance with 10 C.F.R. § 50.54(hh)(2), there was adequate reason to grant access to ISG-016.²⁴ Staff insists that Intervenor have not established why publicly available documents are not adequate for Intervenor's purposes. Staff ignores the fact that there is no publicly available version of ISG-016. Further, the Intervenor's need ISG-016 for the same reasons that NEI 06-12 was needed—to gather information related to mitigative strategies for LOLA events and how such are expected to be implemented.²⁵ This is part of a larger effort by Intervenor to determine whether the requirements of 10 C.F.R. § 50.54(hh)(2) are met by the Applicant.

The Board ruled that the Intervenor is entitled to ISG-016 on a showing that access would facilitate their meaningful participation in the adjudication.²⁶ The Board noted the Intervenor's efforts related to both the access to ISG-016 and the broader questions concerning compliance with the fires and explosions regulations. The Board discussed four ways the Intervenor's demonstrated need for ISG-016, based on Intervenor's involvement with ISG-016:

(1) Intervenor noted the expected issuance of the document [ISG-016] and informed the Board and other parties about it in their September 2009 Reply on the current contentions; (2) they followed its progress thereafter, and requested access to it within a reasonable time after it was issued; (3) they have shown its relevance to matters at issue in the proceeding relating to the requirements of §§ 52.80(d) and 50.54(hh)(2), which have been a concern of Intervenor from the outset of this proceeding; and (4) they have an expert who can provide support for any new contentions relating to these requirements and to any provisions of ISG-016.²⁷

The Board's finding of relevance is particularly important because it acknowledges a relationship between the subject matter of ISG-016 and the Intervenor's contentions regarding Applicant's compliance

²³ Staff brief, p. 8.

²⁴ Board Order, pp. 21-22.

²⁵ Board Order, p. 20.

²⁶ Board Order, pp. 20-22. The Board reasoned that even under the provisions of the Access Order the Intervenor needed only to show that ISG-016 was needed for meaningful participation in the adjudication. The additional predicate imposed by the Staff would require Intervenor 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.

²⁷ Board Order, pp. 21-22.

with 10 C.F.R. § 50.54(hh)(2).²⁸ In drawing this relationship the Board recognized that to further these efforts on the fires and explosions regulations the Intervenor were entitled to ISG-016 under considerations of “basic fairness.”²⁹

The Staff argues this appeal is controlled by the Access Order specified at 74 Fed. Reg. 7934, 7936, that addresses SUNSI materials.³⁰ 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.”³¹ Nevertheless, the Board, in effect, applied the Access Order standards regarding need and decided that Intervenor met such.³² The procedural relief that the Board entered, directing access to ISG-016, is precisely what would have been afforded under the Access Order except, in this case, there are additional restrictions on the use and disclosure of ISG-016 imposed under the Protective Order. But these restrictions are not enough for Staff. Staff cites to *South Texas Project*, 69 NRC 303, 312-13 (2009) as support for their position that there has been no showing of “need.”³³ The Board in this case determined the holding in *South Texas Project* did not apply because here the Intervenor are actual parties and have specified a need for ISG-016.³⁴ Further, the Board recognized that the relevance of ISG-016 is similar to the relevance of the industry guidance NEI 06-12 in terms of determining whether Applicant’s mitigative strategies are consistent with regulatory requirements.³⁵

The Staff also argues that the Board’s Order allows parties greater access to SUNSI materials than non-parties. This is a red herring. First, as parties, the Intervenor have established that they have

²⁸ Under the Federal Rules of Civil Procedure broad access to relevant information is allowed at the discovery stage. Litigants “may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party....” Fed.R.Civ.P. 26(b)(1). *Jewish War Veterans of the U.S. of America, Inc. v. Gates*, 506 F.Supp.2d 30, 41(D.D.C. 2007).

²⁹ Board Order, p. 20.

³⁰ Staff Brief, pp. 6-10.

³¹ 74 Fed. Reg. 7934, 7936 (emphasis added)

³² Board Order, p. 22.

³³ 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, Intervenor cannot provide this explanation, because Intervenor already have access to the non-public part of the Application that the contentions are based on and have submitted contentions regarding the Application.

³⁴ Board Order, p. 20.

³⁵ *Id.*

met the requirement of standing, something non-parties have not done. Second, Intervenors' request for ISG-016 has not occurred in a vacuum. It came as a result of continued advocacy by Intervenors related to the fires and explosions regulations. Third, the Staff has not argued that ISG-016 is irrelevant or immaterial to the Intervenors' continuing efforts related to the fires and explosions regulations. It is reasonable to allow Intervenors access to ISG-016 under these circumstances.

Staff's assertion that, as parties, Intervenors have more access to SUNSI information than non-parties is accurate, but irrelevant. The Protective Order recognizes the Intervenors' party status and establishes procedures, agreed to by Staff, for access to SUNSI materials. Staff's refusal to provide Intervenors access to ISG-016 contradicts the Protective Order.

The Staff rejects the Board's finding of relevance and repeats that Intervenors have not demonstrated a need for ISG-016.³⁶ However, the Board acknowledged that from the outset of the Intervenors' activity in this COLA there has been a focus on the Applicant's compliance with 10 C.F.R. § 50.54(hh)(2). And the Board recognized that guidance from sources such as the NRC Staff may shed light on compliance with these new regulatory requirements.³⁷

Intervenors have had access to the industry's guidance under the strictures of the Protective Order and there is no good reason to treat the Staff's guidance under a different standard. The Staff did not argue that NEI 06-12 was not needed by the Intervenors. And Staff makes no argument why the industry guidance was needed by Intervenors to formulate new contentions but its guidance is off limits.

Conclusion

The Applicant's compliance with the fires and explosions regulations is still an open question. What the regulations themselves actually mean, as applied, is likewise still an open question to the extent such have not been part of a contested adjudication that includes a Commission interpretation. Staff's

³⁶ Staff brief, p.11.

³⁷ Board Order, pp. 19, 21.

contribution to whether compliance has been achieved has been to resist disclosure of its guidance and thereby further cloud the question of Applicant's compliance with 10 C.F.R. § 50.54(hh)(2).³⁸

Intervenors urge that the Commission affirm the Order that ISG-016 be provided to the Intervenors as specified by the Board.

Respectfully submitted,

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³⁸ See Board Order, p. 20. "In light of the somewhat minimal information that is included in the rules themselves, Intervenors' argument on needing such clarification carries some weight."

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2010 a copy of “Intervenors’ Response Brief in Opposition to Staff’s Appeal of LBP-10-05, Sections IV and V.B.” was served by the Electronic Information Exchange on the following recipients:

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