

April 15, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S MOTION FOR AN EXTENSION
OF TIME TO MOVE FOR A PROTECTIVE ORDER

INTRODUCTION

On April 13, 2010, the Atomic Safety and Licensing Board issued an order granting access to ABWR DCD Chapter 19. *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 & 4) (ML101030739) (LBP Apr. 13, 2010) (unpublished Order) (Order). In response to the Order, the NRC Staff hereby files this motion for an extension of time to move to file a protective order.¹ The Order directs the Staff to afford Intervenors access to Chapter 19

¹ Pursuant to 10 C.F.R. § 2.323(b), the Staff made a sincere effort to consult with the other parties. Counsel for the Applicant stated that the Applicant does not oppose this motion. The Staff was unable to speak to Counsel for Intervenors. The Staff understands that Counsel is out of the office for the Comanche Peak Oral Argument and will not return before the Staff's extension request is due. The Board's Initial Scheduling Order requires that a motion for an extension of time be filed at least three business days before the due date for the pleading. *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 & 4) (ML092930523), at *10 (LBP Oct. 20, 2009) (unpublished Order) (Initial Scheduling Order). In this case, the due date for the pleading is 7 days from the Board's April 13 Order, which is Tuesday, April 20. Three business days prior to this date is Thursday, April 15. Accordingly, the NRC Staff must file its motion before Counsel for Intervenors returns. Therefore, the Staff cannot indicate whether this motion is opposed or supported by Intervenors.

In accordance with the Board's Initial Scheduling Order, we certify that we have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and we certify that our efforts have been unsuccessful.

of the ABWR DCD within 14 days from the date of the Order. Order at 1. The Order also states that if the Staff wishes to impose restrictions on the use and disclosure of this document, it could move for a protective order and provide a legal basis to restrict use of this document within 7 days from the date of the Order. *Id.* at 1-2. As discussed below, the Staff respectfully requests an extension of time to file a motion for a protective order until Intervenors have requested and been granted access to SUNSI portions of ABWR DCD Chapter 19 in accordance with the Commission's "Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation." 74 Fed. Reg. 7,934, 7,936 (Feb. 20, 2009) (Access Order).

DISCUSSION

The Order states that the Staff has not publicly asserted that ABWR DCD Chapter 19 contains material it deems to be protected. See Order at 1. At the hearing in Bay City, Texas on April 7, 2010, counsel for the Staff stated that ABWR DCD Chapter 19 contained security-related SUNSI information. Transcript of Oral Argument at 937, *STP Nuclear Operating Co.* (South Texas Project, Units 3 & 4) (Apr. 7, 2010). Counsel for the Staff also stated that the Staff planned to complete a SUNSI review of ABWR DCD Chapter 19 and make a redacted version publicly available once the review was complete. *Id.* at 937-38. The Staff has since completed its SUNSI review of the 1,218 page document and has identified 6 pages that contain security-related SUNSI information.

As this Board previously noted, the Commission's regulations do not provide a definition for SUNSI. See *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 & 4), LBP-10-02, 71 NRC ___ (slip op. at 6). However, the regulations state that SUNSI includes, but is not limited to, proprietary, confidential commercial, and *security-related information*. See 10 C.F.R. § 2.311(a)(3). Further, the Staff explained in SECY-04-0191 that SUNSI includes information that does not meet the definition of SGI, yet "could reasonably be expected to be

useful to a potential adversary.” SECY-04-0191, Withholding Sensitive Unclassified Information Concerning Nuclear Power Reactors From Public Disclosure, attach. 1, at 1 (Oct. 19, 2004) (ML042310663). It also stated that “[i]nformation 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.* Significantly, in the Staff Requirements Memorandum (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 (Nov. 9, 2004) (ML043140175).² Consistent with the policy set forth in SECY-04-0191 and the Commission’s regulations, the Staff has identified SUNSI in ABWR DCD Chapter 19.

The Staff has redacted the SUNSI information from ABWR DCD Chapter 19 and will soon make the redacted version available on the NRC’s public website. Thus, in accordance with the Board’s Order, the Staff will provide the Intervenor access to 1,212 page of this document within 14 days of the Order. See Order at 1.

The Staff seeks an extension of time from the Board’s Order requiring the Staff to move for a protective order within 7 days from the date of the Order if it wished to impose limitations on the Intervenor’s use and disclosure of Chapter 19. Order at 1. The Staff has demonstrated appropriate cause for an extension because the staff has not yet received a request for SUNSI

² The Staff has since circulated COMSECY-05-0054, which included a seven-tiered approach to SUNSI categorization. Policy Revision: Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information (SUNSI) (Oct. 26, 2005) (ML052520181). The Commission disapproved this policy, calling for the Staff to create a simplified two tiered approach to SUNSI until the Federal government developed a government-wide policy. SRM-COMSECY-05-0054 (June 29, 2006) (ML061800218). However, the Commission stated that “[w]hile the Staff develops the simplified policy, it should continue to use the SUNSI policy it has in place.” *Id.* at 1.

information in accordance with the procedures set forth in the Commission's Access Order. See Initial Scheduling Order at 10. Specifically, the Commission's Access Order states that an individual request for access to 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 the 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. The Staff recognizes that this Board has previously stated that the intended applicability of the Commission's Access Order appears to be limited to "the time period bracketed, on one end, by the issuance of the Notice of Order, Hearing and Opportunity to Petition for Leave to Intervene, and, on the other end, by the issuance of the Order granting intervention." *South Texas*, LBP-10-02, 71 NRC __ (slip op. at 8-9 n.36). However, the Staff's position that the SUNSI Access Order is not limited to this time frame is currently before the Commission on appeal. See NRC Staff Brief in Support of Appeal of LBP-10-02 (Feb. 9, 2010). Pending a Commission decision on this Appeal, the Secretary of the Commission granted the Staff a stay of the effectiveness of the Board's previous order to disclose ISG-016, which also contains SUNSI information. *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 & 4) (ML100481206) (Feb. 17, 2010) (unpublished Order). Accordingly, until the Commission rules on the interpretation and applicability of the Access Order, the Staff maintains its position that it cannot release SUNSI information unless a request has been made and a need for the information demonstrated, in accordance with the Commission's Access Order. Absent such a request and demonstration of need, disclosure of SUNSI in ABWR DCD Chapter 19 would contravene the Access Order.

An extension of time would allow parties to review the publicly available 1,212 pages of ABWR DCD Chapter 19. If a party determines that the redacted SUNSI information is needed, this redacted information could be requested in accordance with the Commission's Access

Order. Unless and until a request is made for SUNSI in the ABWR DCD Chapter 19, a protective order is unnecessary.

CONCLUSION

For the reasons set forth above, the Staff respectfully requests an extension of time to move for a protective order to protect SUNSI information in ABWR DCD Chapter 19 until such time as a party submits a request and is granted access to this information in accordance with the Commission's Access Order.

Respectfully submitted,

/signed electronically by/

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Executed in Accord with 10 CFR § 2.304(d)

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Dated at Rockville, Maryland
this 15th day of April, 2010

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CERTIFICATE OF SERVICE

I hereby certify that copies "NRC Staff's Motion for an Extension of Time to Move for a Protective Order," have been served upon the following persons by Electronic Information Exchange this 15th day of April, 2010:

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