

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

STP NUCLEAR OPERATING COMPANY)

(South Texas Project Units 3 and 4))

Docket Nos. 52-012-COL
52-013-COL

November 6, 2009

**STP NUCLEAR OPERATING COMPANY'S ANSWER OPPOSING MOTION TO
MAKE PUBLIC THE ORAL ARGUMENTS AND DOCUMENTS RELATED TO THE
LARGE FIRES AND EXPLOSIONS CONTENTIONS**

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(c), STP Nuclear Operating Company ("STPNOC"), applicant in the above-captioned proceeding, hereby submits this Answer opposing the 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" (Nov. 2, 2009) ("Motion"). The Motion requests that all oral arguments and any hearings related to the Intervenor's pending contentions on the requirements of 10 C.F.R. § 50.54(hh)(2), for dealing with loss of large areas of a plant due to fires or explosions, be conducted in public pursuant to 10 C.F.R. § 2.328.¹ The Motion also requests that all related documentation, including pleadings and guidance documents, be made publicly available.²

As discussed below, the Motion should be denied because (1) the Motion is untimely; (2) the Intervenor improperly certified that they consulted with STPNOC prior to filing the

¹ Motion at 1, 4-5.

² *Id.* at 1, 5-11.

B3

Motion; and (3) the Intervenor have failed to demonstrate that this information should be made public.

II. THE MOTION SHOULD BE REJECTED

A. The Motion Is Untimely

The Motion is untimely. The NRC regulations, 10 C.F.R. § 2.323(a), state that “[a] motion must be made no later than ten (10) days after the occurrence or circumstances from which the motion arises.” STPNOC provided the Intervenor with a copy of the “South Texas Project Units 3 & 4 Mitigative Strategies Report 10 CFR 52.80(d)” (“Mitigative Strategies Report”) on July 7, 2009.³ Thus, the Intervenor have been in possession of the underlying documents since July 2009, shortly after the Board issued the Protective Order governing disclosure of this information.⁴ The Mitigative Strategies Report is clearly marked as “Security-Related Information,” and the Intervenor have not objected to that designation. All pleadings referenced in the Motion related to the Mitigative Strategies Report were filed in the July – September 2009 timeframe. Thus, objections to the designation of these pleadings are untimely.

While the Intervenor argue that the Motion is timely “because there has been no ruling concerning what parts of the hearing are to be closed to the public,”⁵ this argument must fail. First, this explanation is completely unrelated to their request that the identified documents be made publicly-available.⁶ Additionally, the Board already specified on October 14, 2009 that the

³ See Letter from S. Burdick, Counsel for STPNOC, to R. Eye, Counsel for Intervenor, Transmittal of § 52.80(d) Mitigative Strategies Report (July 7, 2009). Additionally, in response to a request by the Intervenor, STPNOC provided them with a copy of NEI 06-12, “B.5.b Phase 2&3 Submittal Guideline,” Rev. 2 (Dec. 2006) on July 14, 2009. NEI 06-12 is also designated as “Security-Related Information”; however, this designation was not made by STPNOC.

⁴ Memorandum and Order (Protective Order Governing the Disclosure of Protected Information) (July 1, 2009) (“Protective Order”).

⁵ Motion at 4.

⁶ In fact, many of the documents that the Intervenor request be made public were documents that the Intervenor themselves marked as protected. See Motion at 1. The Intervenor cannot now—more than a

upcoming oral arguments on the mitigative strategies contentions “will address sensitive unclassified non-safeguards information (SUNSI), [and] significant portions of the argument will be closed to the public.”⁷ Thus, even if this notice of oral argument were the trigger date for a motion, the November 2nd Motion would still be late because it was filed more than 10 days after the Board’s October 14th notification.

Aside from the time limits specified in the NRC regulations, the Board should look unfavorably on the Intervenor’s request because they provide no justification for their eleventh hour Motion. Indeed, the Intervenor has been on notice regarding the potential for a closed oral argument to address the pending contentions for months—ever since the Protective Order was issued. The Motion, however, was submitted on November 2, 2009, just 11 days before the scheduled oral argument. The Intervenor’s eleventh-hour filing prejudices STPNOC and the NRC staff by essentially forcing them each to file an answer well before the 10 day period specified by 10 C.F.R. § 2.323(c). Furthermore, the late filing provides the Board with little time to consider the answers by STPNOC and the NRC staff and issue an order prior to the scheduled date of the oral argument. Such tactics by the Intervenor should not be countenanced.

B. The Intervenor Failed to Properly Consult with STPNOC

The NRC regulations, 10 C.F.R. § 2.323(b), require that a motion be rejected if the movant fails to make “a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant’s efforts to resolve the issue(s) have been unsuccessful.” The Intervenor failed to make a “sincere effort” to resolve the issues raised in the Motion with the other parties to this proceeding. Apparently, the Intervenor attempted to

month after filing these documents—claim that they did not have an earlier opportunity to challenge this designation.

⁷ Notice (Regarding Oral Argument) at 1 (Oct. 14, 2009).

send an e-mail to counsel for STPNOC on the same day that the Motion was filed, but counsel for STPNOC never received that e-mail.⁸ Nonetheless, even if that e-mail had reached counsel for STPNOC, a sincere effort does *not* involve sending a single e-mail on the same day that a motion is to be filed and never following-up with a second e-mail or with a telephone call. Therefore, the Motion should be rejected because the Intervenor failed to comply with Section 2.323(b).⁹

Additionally, the Intervenor failed to comply with the certification requirements specified in the Initial Scheduling Order. That order states:

In accordance with 10 C.F.R. § 2.323(b), an opposed motion will be rejected if it does not include the following certification by the attorney or representative of the moving part:

“I certify that I 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 I certify that my efforts have been unsuccessful.”¹⁰

Instead of providing the certification required by the Initial Scheduling Order, the Intervenor stated: “Counsel for Intervenor hereby certifies pursuant to 10 C.F.R. § 2.323(b) that opposing counsel was contacted regarding this motion but such contact did not resolve the issues raised herein.”¹¹ Contrary to the requirements of the Initial Scheduling Order, the certification in the Motion does not indicate that the Intervenor made a “sincere effort” to explain the factual and legal issues or to resolve those issues. The statement that “opposing counsel was contacted” is

⁸ Counsel for STPNOC only learned of the Motion after receiving an e-mail in the afternoon of November 2, 2009 in which counsel for the NRC staff informed the Intervenor that the staff opposes the Motion.

⁹ See, e.g., *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-08-29, 68 NRC 399, 902 n.12 (2008) (rejecting a motion for failing to comply with consultation requirements of 10 C.F.R. § 2.323(b); see also *Entergy Nuclear Vt.t Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 129-31 (2006) (stating that a phone call on the day a motion was filed should not be viewed as a sincere effort to resolve the issue).

¹⁰ Initial Scheduling Order at 10 (Oct. 20, 2009).

¹¹ Motion at 11.

not the certification required by the Initial Scheduling Order. Therefore, the Motion should be rejected for failing to comply with the Initial Scheduling Order.

C. The Intervenor Have Not Provided a Sufficient Demonstration that Oral Arguments and Hearings Should Be Open to the Public or that Public Disclosure of All Pleadings Is Warranted

The Intervenor claim that oral arguments and hearings related to STPNOC's Mitigative Strategies Report should be conducted in public pursuant to 10 C.F.R. § 2.328.¹² The Intervenor also assert that all related pleadings, as well as NEI 06-12, Revision 2, should be made available on the NRC's document management system.¹³ As demonstrated below, the Intervenor have failed to provide a sufficient demonstration that oral arguments and hearings related to the Mitigative Strategies Report should be open to the public or that public disclosure of all or any of the pleadings and documents relating to the Mitigative Strategies Report is warranted.¹⁴

As an initial matter, when the Mitigative Strategies Report was submitted to the NRC, STPNOC requested that the report be withheld from public disclosure under Section 2.390. Pursuant to Section 2.390(d)(1), the mitigative strategies (which are intended to address fires and explosions that originate from intentional acts as well as other causes) are security-related information that should be protected from public disclosure, because disclosure of such information could be helpful to an adversary planning an attack on the facility. In fact, the Intervenor themselves do not appear to disagree that the mitigative strategies are entitled to such

¹² *Id.* at 4.

¹³ *Id.* at 1-2, 9-11.

¹⁴ The Intervenor identify a September 15, 2009 document titled, "Intervenor's Consolidated Response to the Answers of Applicant and NRC Staff to the Intervenor's Contentions Regarding Applicant's Submittal Under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2)," as one of the documents that should be publicly disclosed. Motion at 2, 10. STPNOC never received such a document in this proceeding, and no such document is on NRC's electronic hearing docket for this proceeding.

protection. Accordingly, there is no disagreement amongst the parties that the Mitigative Strategies Report and other documents that discuss the mitigative strategies are entitled to protection under Section 2.390.

Instead, the Intervenors contend that the entirety of the upcoming oral argument should be open to public because they do not “anticipate that the detailed information” in the Mitigative Strategies Report “would be presumptively required to be covered in a public hearing.”¹⁵ This claim is unsupported given that the Board has already indicated that the oral argument “*will*” address SUNSI information and that the purpose of the oral argument is to address issues raised by the Board regarding the Intervenors’ seven new contentions—all of which directly concern the contents of the Mitigative Strategies Report.¹⁶

Furthermore, STPNOC anticipates that it will be discussing the specifics of its mitigative strategies frequently during the oral argument. For example STPNOC anticipates that, throughout the oral argument, it will be discussing examples of how the “flexible response” strategy in NEI 06-12 is implemented by the strategies discussed in the Mitigative Strategies Report. Because such discussions are likely to occur throughout the oral argument, it will be difficult if not impossible to segregate the oral argument into public and non-public segments. Accordingly, there is no basis for the Intervenors’ request that the entirety of the upcoming oral argument be open to the public.

In support of their Motion, the Intervenors rely on 10 C.F.R. § 2.328, which requires that “all hearings will be public unless otherwise ordered by the Commission.” Even if Section 2.328

¹⁵ Motion at 1 n.1.

¹⁶ Notice (Regarding Oral Argument) at 1 (emphasis added).

is assumed to be applicable to oral arguments,¹⁷ it merely states that “all hearings will be public *unless otherwise ordered by the Commission.*”¹⁸ NRC regulations make clear that the “Commission” includes “any officer to whom has been delegated authority pursuant to section 161n of the Act.”¹⁹ Thus, even if Section 2.328 were applicable to oral arguments, the Board has authority to close an argument from the public in appropriate circumstances.²⁰

The Intervenor have also failed to demonstrate that public disclosure of all pleadings relating to the Mitigative Strategies Report is warranted. Given that the Mitigative Strategies Report is entitled to protection under Section 2.390—a fact that the Intervenor have not disputed—all pleadings discussing information included in the Mitigative Strategies Report must likewise be protected in accordance with Section 2.390 and the Board’s Protective Order. Additionally, the Intervenor’s assertion that the pleadings merely reference the mitigative strategies and do not discuss the strategies is factually incorrect. For example, “STP Nuclear Operating Company’s Answer Opposing Late-Filed Contentions Regarding the Mitigative Strategies Report” discusses and even quotes a number of mitigative strategies.²¹ Furthermore, it

¹⁷ It is doubtful whether this provision is applicable to oral arguments. NRC regulations distinguish between a “hearing,” which refers to an evidentiary hearing, *see, e.g.*, 10 C.F.R. §§ 2.309(a), 2.310, 2.327(a), and an oral argument, *see* 10 C.F.R. § 2.331. This distinction is emphasized in the *North Anna* licensing board decision cited in the Intervenor’s Motion. *See Va. Elec. and Power Co.* (North Anna Power Station, Unit 3), LBP-08-23, 68 NRC 679, 684 (2008) (noting that while “[t]he term ‘hearing’ is not defined, . . . other provisions of 10 C.F.R. Part 2 that . . . refer to a ‘hearing’ suggest that it means an evidentiary hearing”). Furthermore, the *North Anna* licensing board also emphasized that “[o]ral argument on contention admissibility is not a ‘right’” and “Boards have broad discretion to issue procedural orders to regulate the course of proceedings.” *Id.* at 683 (quoting *Entergy Nuclear Operations, Inc.* (Indian Point, Units No. 2 & 3), CLI-08-7, 67 NRC 187, 191-92 (2008)). These points further suggest that there is no requirement for a public oral argument in this case.

¹⁸ 10 C.F.R. § 2.328 (emphasis added).

¹⁹ *Id.* § 2.4.

²⁰ Moreover, none of the cases cited by the Intervenor supports their claims for public hearings or publicly disclosing information properly exempted from public disclosure under FOIA. The Intervenor also cite to the Atomic Energy Act (“AEA”) at 42 U.S.C. 2133(d) as providing a “public interest” requirement for licensing nuclear plants. Motion at 4. No such requirement is found therein. Thus, the Intervenor’s reference to a “public interest” standard of the AEA is unavailing.

²¹ *See* STP Nuclear Operating Company’s Answer Opposing Late-Filed Contentions Regarding the Mitigative Strategies Report at 22-23, 25-26, 29 n.95, 34-35, 37-38 (Sept. 4, 2009).

logically follows that pleadings addressing what information is *not* included within the Mitigative Strategies Report must also be protected from public disclosure given that such information could be helpful to an adversary planning an attack on the facility.

Finally, the Intervenor's request for public disclosure of NEI 06-12 is unavailing. Intervenor asserts that STPNOC has the burden of identifying the portions of NEI 06-12 that are sensitive and should be withheld from public disclosure.²² However, STPNOC has not submitted that document on the record and therefore there is no reason for STPNOC to make any demonstration regarding that document. Furthermore, STPNOC did not prepare the document, and it is not STPNOC's document. Instead, the Nuclear Energy Institute ("NEI") prepared the document and submitted it to the NRC. When it did so, it requested that this document be withheld from public disclosure under Section 2.390. To the extent that the Intervenor wishes to challenge that designation, they may file such a request under the Freedom of Information Act ("FOIA") and NRC's implementing regulations in 10 C.F.R. Part 9.²³

In summary, the Intervenor has failed to demonstrate that oral arguments and hearings related to the Mitigative Strategies Report should be open to public or that public disclosure of all pleadings and documents relating to the Mitigative Strategies Report is warranted.

²² Motion at 3 n.6, 11.

²³ It is not within STPNOC's authority to re-designate NEI 06-12 or the information contained within as publicly available information. *Cf.* 10 C.F.R. § 9.28(a) (requiring that notice and opportunity to object be given to the submitter of a document that has been designated as confidential commercial or financial information if the NRC makes an initial determination that information should be disclosed in response to a FOIA request).

III. CONCLUSION

For the foregoing reasons, the Motion is both procedurally and substantively defective.

Therefore, the Motion should be denied.

Respectfully submitted,

Signed (electronically) by Steven P. Frantz

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Counsel for STP Nuclear Operating Company

Dated in Washington, D.C.
this 6th day of November 2009

CERTIFICATION

I certify that I did not receive any communication from the Intervenors regarding their plans to file the Motion. I did not learn of their plans until I received an email from counsel from the NRC staff in the afternoon of November 2, 2009, responding to an email from the Intervenors. The staff's email indicated that the Intervenors apparently had attempted to email me. However, for whatever reason, the Intervenors' email was not received by me. The NRC staff's email indicated that the staff would oppose such a Motion. The Intervenors filed their Motion later that day.

Signed (electronically) by Steven P. Frantz
Steven P. Frantz

Counsel for STP Nuclear Operating Company

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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STP NUCLEAR OPERATING COMPANY)	
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)	

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2009 a copy of "STP Nuclear Operating Company's Answer Opposing Motion to Make Public the Oral Arguments and Documents Related to the Large Fires and Explosions Contentions" was served by the Electronic Information Exchange on the following recipients:

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