

3-10

~~CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER~~

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP 10-02

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael M. Gibson, Chairman
Dr. Gary S. Arnold
Dr. Randall J. Charbeneau

In the Matter of

SOUTH TEXAS PROJECT NUCLEAR
OPERATING CO.

(South Texas Project Units 3 and 4)

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

ASLBP No. 09-885-08-COL-BD01

January 29, 2010

ORDER

(Rulings on the Admissibility of New Contentions and on
Intervenors' Challenge to Staff Denial of Documentary Access)

This proceeding involves the 10 C.F.R. Part 52 application of the South Texas Project Nuclear Operating Company ("STP" or the "Applicant")¹ seeking combined operating licenses ("COL") for two new nuclear units, using the Advanced Boiling Water Reactor certified design, at its site in Matagorda County, Texas. Two matters are before the Licensing Board for resolution. First, Intervenors² have asserted seven new contentions that challenge the adequacy of the Applicant's May 26, 2009 Mitigative Strategies Report, which addresses the possible loss of large areas of the nuclear plant due to fires or explosions. Second, Intervenors have challenged NRC Staff's refusal to provide them with access to DC/COL-ISG-016 ("ISG-016")³, a Draft

¹ STP filed the Application on behalf of the joint applicants for STP Units 3 and 4, including NRG South Texas 3 LLC, NRG South Texas 4 LLC, and the City of San Antonio, Texas, acting by and through the City Public Service Board ("CPS Energy").

² Intervenors are the Sustainable Energy and Economic Development Coalition ("SEED"), the South Texas Association for Responsible Energy, and Public Citizen.

³ NRC Staff posted a notice about the existence of ISG-016 on its public website at <http://www.nrc.gov/reading-rm/doc-collections/isg/col-dc-isg-16.pdf> (dated Oct. 7, 2009). We note that a document on the NRC Intranet entitled "New Reactors Hot Topics" and dated January 15, 2010 stated that NRC Staff developed "DC/COL-ISG-016, Compliance with 10

~~Information in this record was deleted
in accordance with the Freedom of Information
Act, exemptions
FOIA- 2010-0175~~

Received 1/29/10

2-16

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

Interim Staff Guidance document that the NRC Staff has designated as containing Sensitive Unclassified Non-Safeguards Information ("SUNSI"). As discussed below, we hold that all seven of these newly proffered contentions are inadmissible, and we sustain Intervenor's challenge regarding documentary access to the extent NRC Staff is directed to reevaluate Intervenor's request for ISG-016 in accordance with this Order.

I. Background

As catalogued in detail in a prior order in this case,⁴ Intervenor challenge the Applicant's efforts to obtain COLs to build and to operate two additional nuclear reactors in Matagorda County, Texas, on the site where the Applicant currently operates two reactors. Previously, this Board accorded standing to Intervenor and admitted five of their twenty-eight original contentions.⁵

The instant disputes arise as a result of the Applicant's May 26, 2009 addendum to its combined license application ("COLA").⁶ This addendum, in turn, is based on the Applicant's Mitigative Strategies Report, also submitted on May 26, 2009, which was prepared to comply with 10 C.F.R. §§ 50.54(hh)(2) and 52.80(d).⁷ On August 14, 2009, Intervenor submitted seven additional contentions that relate to this May 26, 2009 addendum. Both the Applicant and

C.F.R. 50.54(hh)(2) and 10 C.F.R. 52.80(d) Loss of Large Areas of the Plant due to Explosions or Fires from a Beyond-Design Basis Event," to endorse NEI 06-06 Revision 3. The ISG public comment period closed on November 17, 2009, and NRC Staff is reviewing the comments. The document stated that issuance of the final version is expected in January 2010. We expect, therefore, that ISG-016 will soon be finalized, issued, and possibly renamed. Throughout this Order, when we refer to ISG-016, we are referring to its most up-to-date version, regardless of its designation at that time.

⁴ LBP-09-21, 69 NRC ___ (slip op.) (Aug. 27, 2009).

⁵ *Id.*; LBP-09-25, 69 NRC ___ (slip op.) (Sep. 29, 2009).

⁶ *See* 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 (Aug. 14, 2009) at 1 [hereinafter Intervenor's New Contentions].

⁷ *See* Letter from Scott Head, Manager, Regulatory Affairs, STP Units 3 and 4, to NRC Document Control Desk (May 26, 2009) (ADAMS Accession No. ML091470723). The Mitigative Strategies Report is not, however, publicly available because the Applicant maintains it contains SUNSI.

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

NRC Staff filed answers opposing Intervenor's submission.⁸ Intervenor's filed a reply to both the Applicant's and NRC Staff's answers on September 15, 2009.⁹ On November 13, 2009, this Board heard oral argument in Rockville, Maryland, regarding admissibility of the proposed new contentions.¹⁰

The dispute surrounding ISG-016, which had not fully emerged prior to oral argument, and thus was not addressed there, arose as a result of the NRC Staff announcing on its public website, on October 13, 2009, that ISG-016 existed.¹¹ However, because NRC Staff designated ISG-016 as SUNSI—claiming it contains “security-related” information¹²—the public (including Intervenor's) were not afforded access to this document. As a result, on November 5, 2009, Intervenor's sought to obtain ISG-016 from NRC Staff. On November 16, 2009, NRC Staff declined to afford Intervenor's access to ISG-016. As a result, on November 20, 2009, Intervenor's prosecuted a challenge to the denial of access.¹³

II. SUNSI and Public Access Concerns

Before addressing Intervenor's seven new contentions—the discussion of which is set forth in subsequent parts of this Order that are under seal and inaccessible to the public—we turn first to the issue of public access and SUNSI.

⁸ STP Nuclear Operating Company's Answer Opposing Late-Filed Contentions Regarding the Mitigative Strategies Report (Sept. 4, 2009) [hereinafter *STP Answer New Contentions*]; NRC Staff's Answer to Intervenor's Contentions and Request for a Subpart G Hearing (Sept. 8, 2009) [hereinafter *Staff Answer New Contentions*].

⁹ 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) (Sept. 15, 2009) [hereinafter *Intervenor's Response*]. On September 8, 2009, Intervenor's moved to file a consolidated response to the answers of both Applicant and Staff. See Intervenor's Motion to File a Consolidated Response to NRC Staff and Applicant Answers to Contentions Regarding 10 C.F.R. § 50.54(hh)(2) (Sept. 8, 2009). Because a consolidated response was not improper, the Board considered the reply in its evaluation of the admissibility of the proposed contentions.

¹⁰ Tr. at 551-759.

¹¹ See Letter from Michael Spencer to Robert Eye at 1 (Nov. 16, 2009).

¹² Id.

¹³ Letter from Robert Eye to Judges Young and Gibson (Nov. 20, 2009).

~~CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER~~

Access to SUNSI here is sought in adjudication rather than in a request for information under the Freedom of Information Act ("FOIA"), and the reasons for providing access to Intervenor are even more compelling than they are when a member of the public seeks information under FOIA. Here, a party is seeking the information not merely as an interested member of the public, but as a litigant focused on a specific document that may augment the pleading and proof of its claims. Moreover, NRC Staff, as a party opposing Intervenor's claims, is refusing to provide the requested document. A participant in administrative litigation—having an even greater interest in obtaining access to SUNSI than does the general public—is entitled to obtain documents under standards no more restrictive than would be accorded the general public under FOIA.

FOIA provides, with nine enumerated exceptions, that each agency make copies of all records available to the public.¹⁴ NRC regulations implement and repeat this FOIA obligation.¹⁵ In addition, NRC regulations provide, with certain very limited exceptions, that "all hearings will be public,"¹⁶ and that the public is entitled to copies of the transcripts of all hearings.¹⁷

Thus, if it seeks to withhold a document from a party or the public, or to bar a party or member of the public from attending any adjudicatory proceeding before a Licensing Board, NRC Staff must carry the burden of proving that the document or situation fits meets one of FOIA's specifically enumerated exceptions.¹⁸ Moreover, even if a document contains information that is exempt from disclosure, FOIA mandates that "[a]ny reasonably segregable portion of the record shall be provided to any person requesting such record after deletion of the portions which are exempt."¹⁹ NRC's FOIA regulations implement this mandate.²⁰

¹⁴ 5 U.S.C. § 552(a)-(b).

¹⁵ See 10 C.F.R. §§ 9.15, 2.390.

¹⁶ 10 C.F.R. § 2.328.

¹⁷ 10 C.F.R. § 2.327(c).

¹⁸ See 10 C.F.R. §§ 2.325 and 2.390 (proponent of protective order shoulders burden of proof).

¹⁹ 5 U.S.C. § 552(b)(9).

²⁰ See 10 C.F.R. § 9.19. Safeguards Information ("SGI") is an example of a FOIA exemption. Under FOIA, and the NRC regulations implementing FOIA, the duty to make all documents

~~CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 4, 2009 PROTECTIVE ORDER~~

For decades, the Commission has restricted public access to classified information and SGI.²¹ These restrictions on the dissemination and handling of such materials have a clear statutory and regulatory foundation.²²

Approximately four years ago, NRC Staff began to assert an additional category of information that, it believes, also warrants protection from public access.²³ Specifically, the NRC's Executive Director of Operations developed a new classification category, SUNSI, which the Executive Director asserted was exempt from disclosure.²⁴ The Executive Director then directed NRC Staff to implement it.²⁵ As far as this Board is aware, however, there is no statutory or regulatory definition of "SUNSI." The term "sensitive unclassified non-safeguards information" or SUNSI is apparently used only twice in the NRC regulations. First, the regulations authorize the Secretary of the Commission to establish procedures for obtaining access to SUNSI prior to granting intervention in a licensing proceeding.²⁶ Second, the

available does not apply to records "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3); 10 C.F.R. § 2.390(a)(3). SGI qualifies for this exemption because the Atomic Energy Act specifically exempts it from disclosure. 42 U.S.C. § 2167. The NRC has promulgated regulations implementing the FOIA exemption for SGI. See 10 C.F.R. § 73.21. Likewise, FOIA exempts classified information from disclosure, 5 U.S.C. § 552(b)(1), and NRC regulations implement this exemption. 10 C.F.R. § 2.390(a)(1); 10 C.F.R. Part 2 Subpart I; 10 C.F.R. Part 95.

²¹ See 10 C.F.R. §§ 95.34, 73.21; 38 Fed. Reg. 35,430 (Dec. 28, 1973).

²² See supra n.20.

²³ See NRC Briefing on Sensitive Unclassified Non-Safeguards Information Policy (Feb. 2, 2006) at 8, available at <http://www.nrc.gov/reading-rm/doc-collections/commission/tr/2006/20060202b.pdf> ("Over time, the EDO's [Executive Director of Operations] office and the staff had recognized, particularly in a number of reviews we did to look at root causes for the inadvertent release of information. What we found was . . . that a large share of our documents were being marked "official use only" There was inconsistent treatment in document markings.").

²⁴ See Management of Sensitive Unclassified Non-Safeguards Information, Task Force Report for the Executive Director of Operations (Nov. 10, 2004) at 1 (ADAMS Accession No. ML043010551).

²⁵ See Memorandum from Luis A. Reyes, NRC Executive Director of Operations to Office Directors and Regional Administrators (Jan. 19, 2005) (ADAMS Accession No. ML043500718).

²⁶ 10 C.F.R. § 2.307(c).

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

regulations authorize interlocutory appeal to the Commission of certain rulings relating to SUNSI.²⁷ But these regulations never define the term.

The only plausibly relevant regulation that helps circumscribe the concept of SUNSI is 10 C.F.R. § 2.390(d), which specifies in pertinent part:

The following information is considered commercial or financial information within the meaning of § 9.17(a)(4) of this chapter and is subject to disclosure in accordance with the provisions of § 9.19 of this chapter.

1. Correspondence and reports to or from the NRC which contain information or records concerning a licensee's or applicant's physical protection, classified matter protection, or material control and accounting program for special nuclear material, not otherwise designated as Safeguards Information or classified as National Security Information or Restricted Data....

Although 10 C.F.R. § 2.390(d) never uses the term SUNSI, this regulation seems to fit NRC Staff's claim that SUNSI is "security-related," and it is our best lodestar as to the meaning of this term. Under this regulation, in order for a document to qualify as exempt from FOIA disclosure as "SUNSI" the document must:

1. Qualify as commercial or financial information under 10 C.F.R. § 9.17(a)(4) (commonly referred to as "FOIA Exemption 4")²⁸;
2. Constitute "correspondence and reports to or from NRC;"
3. Contain information or records concerning a licensee's or applicant's
 - i. Physical protection of special nuclear material;
 - ii. Classified matter protection, or
 - iii. Material control and accounting program relating to special nuclear material;
4. Not constitute Safeguards Information; and
5. Not constitute classified information (National Security Information or Restricted Data).

Against this legal background, we turn to the NRC Staff's current claim that ISG-016 is exempt from disclosure and must be withheld from intervenors and the public.²⁹ In a November

²⁷ 10 C.F.R. §§ 2.311(a)(3); 2.311(d)(2).

²⁸ There are additional criteria for determining whether information may be withheld from the public as exempt commercial or financial information. See 10 C.F.R. § 2.390(b)(3)-(4).

²⁹ We note that the NRC public website states that SUNSI "encompasses a wide variety of categories (e.g., personnel privacy, attorney-client privilege, confidential source, etc.)." <http://www.nrc.gov/security/info-security.html#cfr> (last visited Jan. 28, 2010). This assertion is inconsistent with 10 C.F.R. § 2.390(d). There is no legal basis for sweeping aside the well-established (and long-recognized) privileges such as the Privacy Act, 5 U.S.C. § 552(a), and the

~~CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER~~

5, 2009 letter to NRC Staff, intervenors requested access to ISG-016, a document that the NRC Staff maintains is SUNSI "because it contains security-related information."³⁰ Intervenor represented that they sought ISG-016 to afford them "meaningful participation in the adjudicatory proceeding because it clarifies or addresses issues not discussed in the Standard Review Plan governing compliance with 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2)."³¹ Intervenor also asserted that they cannot meaningfully analyze the Applicant's claim that it has complied with the staff's guidance related to 10 C.F.R. § 50.54(hh)(2) without having access to this guidance document.³²

NRC Staff claims that it evaluated intervenors' request for ISG-016 pursuant to the "Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation" ("SUNSI Access Order").³³ That order states that requests for access to SUNSI will be granted where the requestor both establishes standing to intervene in the proceeding (or a likelihood of obtaining it), and "demonstrate[s] a need for access to SUNSI."³⁴ Although conceding that intervenors have standing in this

Attorney-Client Privilege (see *Georgia Power Co.* (Vogle Electric Generating Plant, Units 1 and 2), CLI 95-15, 42 NRC 181 (1995)) into the new and foreign rubric of SUNSI.

³⁰ Letter from Michael Spencer to Robert Eye at 1. By NRC's own admission, the SUNSI designation protects "information about a licensee's or applicant's physical protection or material control and accounting program for special nuclear material not otherwise designated as [SGI] or classified as National Security Information or Restricted Data." NRC: Information Security, <http://www.nrc.gov/security/info-security.html#cfr> (last visited Jan. 28, 2010). While we are not asked directly to resolve questions about the SUNSI designation process, we note that because ISG-016 was created by NRC Staff, the Staff's designation of its own material as SUNSI is inconsistent with SUNSI's purported objective of protecting licensee or applicant data. See 10 C.F.R. § 2.390(d).

³¹ Letter from Robert Eye to NRC Staff (Nov. 5, 2009).

³² *Id.* Additionally, intervenors claim that the Applicant erroneously used another guidance document, NEI 06-12, asserting it is currently approved by the Commission for use only with respect to existing, not new, reactors. *Id.*

³³ The SUNSI Access Order is appended to the notice of hearing, which here is found at 74 Fed. Reg. 7934, 7936 (Feb. 20, 2009). See also Letter from Michael Spencer to Robert Eye at 2.

³⁴ 74 Fed. Reg. at 7937. However, we note a disparity between the standard articulated in the SUNSI Access Order (which NRC Staff stated it used to evaluate intervenors' request) and that described in another document entitled "NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information." The latter states that "no person . . . may have access to SUNSI unless that person has an established need-to-know the information for

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

proceeding, NRC Staff stated that intervenors failed to establish their need for access to ISG-016. Specifically, NRC Staff determined that intervenors "have not explained how a draft guidance document is necessary to form the basis and specificity for a proffered contention."³⁵ Intervenor challenged the Staff's denial of their request for ISG-016 to this Board on November 20, 2009. We direct NRC Staff to reevaluate intervenors' request for ISG-016.

At the outset, it is noteworthy that it is not at all clear whether the SUNSI Access Order procedures apply to proceedings once a petition to intervene has been granted.³⁶ However,

conducting official business." NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information at 2-3 (ADAMS Accession No. ML051220287) (emphasis added). In 2008, the Commission established procedures for deciding whether parties may access SGI or SUNSI in a proceeding. The Commission determined that the Secretary "will assess initially whether the proposed recipient has shown a need for SUNSI (or need to know for SGI)." Delegated Authority To Order Use of Procedures for Access to Certain Sensitive Unclassified Information, 73 Fed. Reg. 10,978, 10,979 (Feb. 29, 2008); see also 10 C.F.R. § 2.307(c); Procedures to Allow Potential Intervenor to Gain Access to Relevant Records That Contain [SUNSI] or [SGI], Attachment 1, Procedures for Access to [SUNSI] and [SGI] for Contention Preparation at 5 (Feb. 29, 2008) (ADAMS Accession No. ML080380626). In both of these Orders, the Commission has effectively renounced the notion that a party must establish its "need to know" in order to obtain access to SUNSI. Accordingly, any suggestion—in the NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information, or otherwise—that a party seeking access to SUNSI must first demonstrate a "need to know" is erroneous.

³⁵ Letter from Michael Spencer to Robert Eye at 2. NRC Staff also denied access to intervenors by claiming that "[c]ontentions 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." *Id.* While this statement, on its own, is not inaccurate, it is completely irrelevant to intervenors' request for ISG-016.

³⁶ This dispute comes before us, not pursuant to a motion to compel production of this document, but rather as a result of intervenors requesting access to ISG-016 from NRC Staff pursuant to the SUNSI Access Order that was part of the original Notice of Hearing in this case. 74 Fed. Reg. at 7936. Likewise, it was pursuant to the SUNSI Access Order that NRC Staff denied such access and that intervenors prosecuted this challenge to that denial of access. A SUNSI Access Order, which appears in most, if not all, such notices that NRC Staff issues appears to be a creature of 10 C.F.R. § 2.307(c). That regulation states: "In circumstances where, in order to meet the Commission requirements for intervention, potential parties may deem it necessary to obtain access to . . . sensitive unclassified non-safeguards information, the Secretary is delegated authority to issue orders establishing procedures and timelines for submitting and resolving requests for this information." Thus, it appears that the Commission intended the SUNSI Access Order to apply only during 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.

Consistent with this interpretation, the SUNSI Access Order sets a time-schedule that starts 10 days after the Notice is issued, and generally ends before the presiding officer or

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

even assuming arguendo that the procedures outlined in the SUNSI Access Order continue to have vitality after a petition for intervention has been granted, it is clear that the NRC Staff misapplied them here. First, NRC Staff improperly characterized Intervenor's request for access to ISG-016. Intervenor's stated that they sought access to ISG-016 because it is relevant to their assessment of the Applicant's compliance with 10 C.F.R. §§ 50.54(hh)(2) and 52.80(d).³⁷ When NRC Staff denied Intervenor's request for ISG-016 on November 16, 2009³⁸ (three days after this Board heard oral argument on the Intervenor's contentions related to the Applicant's mitigative strategies), it asserted Intervenor's had failed to explain why ISG-016 was necessary to provide the basis and specificity for those contentions.³⁹ In fact, the very existence of ISG-016 was not publicly announced until October 13, 2009,⁴⁰ nearly two full months after

Board has been created. Likewise, 10 C.F.R. § 2.307(c) suggests that this new and novel method is intended only to deal with issues arising before intervention occurs and a Board is created. Therefore, the procedures and schedules set forth in the SUNSI Access Order should not govern the resolution of disputes concerning access to SUNSI once the intervention petition has been granted and the Intervenor's have become actual parties to adjudication—as opposed to the “potential parties” that are referenced in the SUNSI Access Order. Finally, it is significant that the SUNSI Access Order is issued by the Commission or NRC in its role as “supervisor” of NRC Staff and does not constitute an adjudicatory ruling by the Commission. See Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 and 2) CLI-10-06 Slip op. at 18 n.49; (“As the courts have held repeatedly, following the Supreme Court's lead in Withrow v. Larkin, in practicality an agency head often must act on the same matter initially as supervisor and later as adjudicator”). Finally, it is of note that for more than 50 years, Atomic Safety and Licensing Boards have been invested, pursuant to 10 C.F.R. Part 2, with responsibility for resolving disputes concerning discovery and the scope of claimed privileges and FOIA exemptions.

Nevertheless, because of the unusual procedural posture that brought this matter before us, because of NRC Staff's failure to provide a clear, adequate basis on which it would deny Intervenor's access to ISG-016, and because NRC Staff has not made available to Intervenor's (and the general public) the reasonably segregable non-SUNSI portions of ISG-016, we are directing NRC Staff to reevaluate its decision. Certainly, our decision directing NRC Staff to reevaluate its denial of access to ISG-016 should not be deemed to suggest that the Commission intended, by including a SUNSI Access Order in its Notices of Hearing, to create an additional set of procedures for the resolution of disputes concerning SUNSI that may be brought before Licensing Boards after intervention has been granted.

³⁷ Letter from Robert Eye to NRC Staff (Nov. 5, 2009); Letter from Robert Eye to Judges Young and Gibson (Nov. 20, 2009).

³⁸ Letter from Michael Spencer to Robert Eye at 2.

³⁹ Id.

⁴⁰ See id. at 1.

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

Intervenors had submitted their contentions and certainly long after the deadline had passed for filing pleadings with respect to the Applicant's mitigative strategies.

Second, in evaluating Intervenors' request for access to ISG-016, NRC Staff imposed additional burdens on Intervenors that are not warranted under the standards for access to SUNSI. The SUNSI Access Order obligates a party seeking SUNSI only to explain its "need for the information in order to meaningfully participate in this adjudicatory proceeding."⁴¹ It requires nothing more. NRC Staff have attempted to add another requirement for access to ISG-016 that does not appear in the SUNSI guidance, asserting that Intervenors have not "demonstrated a legitimate need for access to DC/COL ISG-016 . . . particularly why it is necessary to provide the basis and specificity for the current contentions, which have already been formulated and submitted."⁴² Contrary to NRC Staff's position, however, the requested document does not have to be directly applicable to an admissible contention—that requirement only applies when a public version of the requested SUNSI document is also available.⁴³ As long as Intervenors can show that access to ISG-016 may enable them to participate more meaningfully in this adjudicatory proceeding, they are to be provided that access.

Because the release of SUNSI poses less of a security threat than either classified information or SGI (where a party must establish a "need to know" to obtain access), there is no basis for piling such added burdens on Intervenors to demonstrate a "need for SUNSI." This is particularly so in light of the fact that the risks attendant to affording access to SUNSI are minimal. The SUNSI Access Order in this case provides that SUNSI is to be released to Intervenors only after they have executed a protective order that governs its use and

⁴¹ 74 Fed. Reg. at 7936.

⁴² Letter from Michael Spencer to Robert Eye at 2.

⁴³ See 74 Fed. Reg. at 7936. Intervenors asserted that there is no publicly-available version of ISG-016. Letter from Robert Eye to NRC Staff; Letter from Robert Eye to Judges Young and Gibson. If a public version does exist, NRC Staff certainly has not so informed the Board.

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

dissemination.⁴⁴ In the instant proceeding, Intervenor's sought access to ISG-016, a non-public document, because of the possibility that it contains information⁴⁵ to support their challenge to the Applicant's compliance with 10 C.F.R. §§ 50.54(hh)(2) and 52.80(d). Even though ISG-016 is only in draft form, Intervenor's request seems reasonable insofar as ISG-016 contains the most up-to-date information available regarding NRC Staff's view of what is necessary to comply with these regulations. Intervenor's stated that they need ISG-016 because it is relevant to their dispute, and it appears reasonably calculated to assist them in forming new contentions.

In conjunction with the reevaluation of its refusal to provide Intervenor's with access to ISG-016, NRC Staff is further directed to segregate those paragraphs of the document that contain SUNSI from those that do not contain SUNSI. NRC regulations require that documents containing classified information or SGI be evaluated paragraph-by-paragraph,⁴⁶ that those paragraphs containing classified information or SGI be redacted, and that the remaining

⁴⁴ See SUNSI Access Order, 74 Fed. Reg. at 7937. That Order states that access to SUNSI will be granted if (among other requirements) "[t]he proposed recipient of the information has executed a Non-Disclosure Agreement or Affidavit and agrees to be bound by the terms of a Protective Order setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI and/or SGI." *Id.*

⁴⁵ We view this standard for obtaining access to SUNSI similar to that used in determining whether a discovery request is permissible under the Federal Rules of Civil Procedure: whether the information sought will assist the party in pleading or proving its claims. Federal Rule of Civil Procedure 26 states "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). Relevant information "need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* Similarly, a party may seek the SUNSI material to provide factual support for its pleadings or an admitted contention against a motion for summary disposition or at trial. The fact that a SUNSI document itself may not be admissible evidence is an insufficient basis for denying access. Rather, providing access to a party seeking the SUNSI may lead to the discovery of admissible evidence (e.g., a new data set that may be referenced in a SUNSI document). As long as there might be information in a SUNSI document that could be reasonably calculated to lead to obtaining factual support for a new contention, factual support to augment a contention that has already been plead, or evidence relative to an admitted contention, there is a need for SUNSI. In fact, because the instant dispute concerns solely whether Intervenor's are to be accorded access to a document that might enable them to augment a pleading, the threshold for obtaining the document is even lower than that applied in a discovery context.

⁴⁶ See 10 C.F.R. 95.37(f); NRC Safeguards Information Security Program Handbook 12.7 Part II (June 25, 2008) at 8-9.

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

paragraphs (not containing such sensitive material) be available for disclosure to the public.⁴⁷

Here, NRC Staff designated ISG-016 as SUNSI in its entirety and did not conduct such a paragraph-by-paragraph analysis.⁴⁸ The reasons for this are unclear—for disclosure of SUNSI poses less of a security threat than would disclosure of either classified information or SGI.

The practical effect of NRC Staff's decision not to conduct a paragraph-by-paragraph analysis of documents containing SUNSI has significance beyond their disclosure to Intervenors. On January 21, 2009, the President announced an Open Government Directive with three goals: (1) to ensure the federal government operates "with an unprecedented level of openness";⁴⁹ (2) to prevent "over classification" of documents;⁵⁰ and (3) to ensure "that the handling and dissemination of information is not restricted unless there is a compelling need."⁵¹ The NRC recently announced that it would comply fully with this Presidential directive.⁵² Blocking public access to materials that are not SUNSI is inconsistent with the NRC's adoption of the Open Government Directive. Only by conducting a paragraph-by-paragraph review of

⁴⁷ See 10 C.F.R. 95.37(f); NRC Safeguards Information Security Program Handbook 12.7 Part II (June 25, 2008) at 8-9.

⁴⁸ Apparently, this is not the first time NRC Staff has decided not to conduct a paragraph-by-paragraph review of documents containing SUNSI. See NRC Briefing on Sensitive Unclassified Non-Safeguards Information Policy at 2. Moreover, the documents that gave rise to the seven new contentions addressed elsewhere in this Order also were not analyzed on a paragraph-by-paragraph basis—instead the entire contents of these document were designated SUNSI, even though neither the Applicant nor NRC Staff indicated the type or amount of SUNSI information contained within these documents. The practical effect, of course, is improperly to shift the burden onto Intervenors to prove their need for the information without the benefit of proper redaction. This procedure is contrary, not only to the NRC's obligations under FOIA and its implementing regulations (discussed supra at nn. 13-20 and accompanying text), but as well to the notion that a party claiming a privilege or other protection bears the burden of pleading and proof to maintain that privilege. See e.g., *Smith v. FTC*, 403 F. Supp. 1000, 1016 (D. Del. 1975) (once the requesting party meets its burden of demonstrating a need for the document, "the burden is upon the claimant of executive privilege to demonstrate a proper entitlement to exemption from disclosure").

⁴⁹ Memorandum: Classified Information and Controlled Unclassified Information, 74 Fed. Reg. 26,277, 26,277 (May 27, 2009).

⁵⁰ *Id.*

⁵¹ *Id.* at 26279.

⁵² See NRC Seeks Input on Open Government Initiative, <http://www.nrc.gov/reading-rm/doc-collections/news/2010/10-007.html> (last visited Jan. 29, 2010); Implementation of Open Government Initiative, 75 Fed. Reg. 1418, 1419 (Jan. 11, 2010).

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

ISG-016 and affording full public access to the non-SUNSI portions can NRC Staff comply with this directive. Certainly, if ISG-016 contains classified information or SGI, that information should be re-designated as such, with appropriate restrictions placed on its dissemination. In addition, NRC Staff should, at a minimum, conduct a paragraph-by-paragraph review of ISG-016 and provide Intervenor with those reasonably segregable portions that do not contain SUNSI.

The implications of excessively broad claims of SUNSI in this case impact not just the Intervenor's access to ISG-016, but, as importantly, the public's access to the adjudicatory process. This problem of denying public access was made abundantly clear at oral argument of Intervenor's seven new contentions. It originated with the Board's own action—issuing a Protective Order on July 1, 2009 that largely memorialized an agreement among the parties regarding the handling of documents related to the Applicant's submittal of its Mitigative Strategies Report. That report addressed the Applicant's efforts to comply with 10 C.F.R. §§ 50.54(hh)(2) and 52.80(d)—the regulations that concern the possibility of a loss of large areas of a nuclear power plant due to fires or explosions. The July 1, 2009 Protective Order enabled Intervenor (and their counsel and expert witnesses) to obtain these documents by executing non-disclosure affidavits restricting the handling and dissemination of the documents. Of particular relevance to our discussion here, the Mitigative Strategies Report, as well as a guidance document (NEI 06-12) on which the Applicant relied heavily in preparing its Mitigative Strategies Report, have been designated as SUNSI. The practical effect of issuing the Protective Order was to ensure that any proceedings related to these documents would be closed to the public—for were Intervenor to disclose the substance of any of such documents in a public forum, they would be in violation of the Protective Order and the non-disclosure affidavits. Accordingly, when Intervenor filed the new contentions that are the subject of this ruling today, the pleadings related to these new contentions were filed under seal in a separate docket that is not open to the public. Moreover, although the Board conducted oral argument on

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

November 13, 2009, for the most part, that oral argument was closed and the public shut out.⁵³

As discussed immediately below, the public is normally to be afforded full access to all NRC proceedings involving the issuance of a license, and the extraordinary step of closure (here, to ensure that SUNSI is not disclosed to the public) should not be instituted unless a party can establish that closure is the only reasonable alternative available. Before this Board will close future proceedings in this case, the party (or parties) seeking closure must demonstrate, in accordance with the discussion below, that the need to close the hearing outweighs the strong presumption that all Licensing Board proceedings will be open to the public.

Anglo-American jurisprudence has long ensured that judicial proceedings will be open to the public.⁵⁴ In a 1980 decision, Richmond Newspapers v. Virginia,⁵⁵ the U.S. Supreme Court enunciated a constitutional basis for public access to courts, grounded in the First Amendment: "Free speech carries with it some freedom to listen."⁵⁶ The First Amendment requires public access not only to criminal proceedings,⁵⁷ but as well both to civil trials⁵⁸ and to trial-type

⁵³ On November 2, 2009, Intervenors belatedly sought to open the oral argument to the public with a "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," filed November 2, 2009. In response, those portions of the November 13, 2009 oral argument that did not involve SUNSI were open to the public, but it was necessary to close the remainder of the oral argument to comport with the July 1, 2009 Protective Order. See Licensing Board Memorandum and Order (Protective Order Governing the Disclosure of Protected Information) (July 1, 2009) (unpublished) [hereinafter Protective Order]. The Protective Order, which all parties signed, specifies that nothing in the Protective Order "shall preclude any person from seeking public disclosure of Protected Information in accordance with NRC regulations." *Id.* at 4. It also directs any party to file a motion for amendment to the Protective Order or non-disclosure affidavits should a dispute arise about the information they protect. *Id.* at 3. As of the issuance date of the instant Order, Intervenors have not moved to amend the Protective Order.

⁵⁴ Pennekamp v. Florida, 328 U.S. 331, 361 (1946) (Frankfurter, J. concurring) ("Of course trials must be public and the public have a deep interest in trials."); Craig v. Harney, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property."). See also in re Oliver, 333 U.S. 257, 278 (1948); and Sheppard v. Maxwell, 384 U.S. 333, 349 (1966) ("The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials' (citation omitted)).

⁵⁵ 448 U.S. 555 (1980).

⁵⁶ Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980).

⁵⁷ *Id.*

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

administrative proceedings,⁵⁹ such as this adjudicatory proceeding.

At the same time, however, public access to judicial proceedings is not absolute. Instead, Richmond Newspapers only creates a "presumption of openness."⁶⁰ To determine whether a tribunal should block public access to a judicial proceeding, Richmond Newspapers established a two-part "experience and logic" test.⁶¹ With respect to the "experience" prong, NRC licensing adjudication has always been open to the public. Long before Richmond Newspapers, the NRC's predecessor, the Atomic Energy Commission, required that—absent compelling circumstances—adjudicatory hearings involving nuclear power plant licensing be open to the public.⁶² That rule affording public access continues to this day.⁶³ In 2005, the

⁵⁸ All Courts of Appeal confronted with this issue have recognized that the First Amendment requires a presumption of openness in civil proceedings. See Gitto Global Corp. v. Worcester Telegram & Gazette Corp., 422 F.3d 1 (1st Cir. 2005); Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110 (2d Cir. 2006); Huminski v. Corsones, 396 F.3d 53 (2d Cir. 2005); In re Cendant, 260 F.3d 183 (3d Cir. 2001); Publicker Industries, Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984); Brown & Williamson Tobacco Corp. v. Federal Trade Comm., 710 F.2d 1165 (6th Cir. 1983); Jessup v. Luther, 227 F.3d 993 (7th Cir. 2000); Grove Fresh Distrib., Inc. v. Everfresh Juice Co., 24 F.3d 893 (7th Cir. 1994); Rice v. Kempker, 374 F.3d 675 (8th Cir. 2004); Cal. First Amendment Coal. v. Woodford, 299 F.3d 868 (9th Cir. 2002); Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304 (11th Cir. 2001).

⁵⁹ See e.g., Detroit Free Press v. Ashcroft, 303 F.3d 681, 702 (6th Cir. 2002), holding that First Amendment required public access to deportation hearing despite government's strenuous objections that open hearings would enable terrorists to obtain information useful to their malevolent goals. That Court noted that as long as the subject administrative proceedings "walk, talk, and squawk" very much like [an Article III] judicial proceeding" they should be open to the public. Id. See also United States v. Miami Univ., 294 F.3d 797, 824 (6th Cir. 2002); Whiteland Woods, L.P. v. W. Whiteland, 193 F.3d 177, 181 (3d Cir. 1999); Soc'y of Prof'l Journalists v. Sec'y of Labor, 616 F. Supp. 569, 574 (D. Utah 1985), vacated as moot 832 F.2d 1180 (10th Cir. 1987). Although the United States Court of Appeals for the Fifth Circuit has not directly addressed this question, the United States District Court for the Southern District of Texas (where the Applicant's proposed reactor will be sited) has recognized a First Amendment basis for public access to administrative proceedings. See Doe v. Santa Fe Independent School Dist., 933 F. Supp. 647, 650 (S.D. Tex. 1996).

⁶⁰ Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980).

⁶¹ While the term "experience and logic test" does not actually appear in Richmond Newspapers, this formulation—attributed to Richmond Newspapers—has been used in subsequent decisions involving public access to judicial proceedings. See, e.g., North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 209-220 (3d Cir. 2002); Detroit Free Press, 303 F.3d at 703.

⁶² 27 Fed. Reg. 377 (Jan. 13, 1962) (promulgating the original public access rule (originally found at 10 C.F.R. § 2.751)).

⁶³ 10 C.F.R. § 2.328.

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

Commission made clear this rule is central to how business is conducted here:

The hearing process established under the Atomic Energy Act is a vehicle to permit members of the public to seek a resolution of their concerns about the health, safety, and environmental impacts of a proposed licensing action, and that process operates most fairly and effectively when those who seek to utilize it have the benefit of accurate information regarding the agency's licensing review system and its possible outcomes.⁶⁴

Moreover, the public is entitled to copies of the transcripts of all Licensing Board hearings.⁶⁵

Clearly, then, the NRC "experience" with adjudicatory hearings is one of openness to the public.

We turn now to the second part of the Richmond Newspapers analysis to determine the circumstances under which closure is appropriate: the "logic" portion of the test. Where an agency deems it appropriate to protect security information from being released to the public, it can certainly do so as long as it hews to its obligations under FOIA and Richmond Newspapers. As discussed previously,⁶⁶ the NRC has for many years placed restrictions on the disclosure of classified information and SGI, and recently, it has done so as well for SUNSI.⁶⁷ In doing so, the NRC has balanced the Commission's goal that proceedings related to adjudicatory hearings be open against the need for security and protection of the public health and safety. However, in the instant dispute, withholding from public access an entire document—just because it may contain some SUNSI information—fails the logic test by excluding the public from access to information that is not security-related. This is not only a misuse of the SUNSI designator, but fails the logic test of Richmond Newspapers. As the NRC's Office of the Inspector General noted in a recent semi-annual report to Congress:

OIG learned that NRC's inconsistent handling of documents considered sensitive has also created concern among some public stakeholders. Specifically, while the NRC staff will not release documents deemed as

⁶⁴ CFC Logistics (Materials License), 61 NRC 45, 50 n.8 (2005).

⁶⁵ 10 C.F.R. § 2.327(c).

⁶⁶ See supra nn. 20-21 and accompanying text.

⁶⁷ President Obama recently addressed the continuing importance of protecting classified information and SGI in a Memorandum for the Heads of Executive Departments and Agencies. 74 Fed. Reg. at 26,277 (May 27, 2009).

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER—**

sensitive to a private citizen, the staff has taken no action to restrict a citizen from obtaining the same documents from the former Local Public Document Rooms (a now-defunct NRC recordkeeping system). This inconsistency has created a perception that the NRC may be using the continued classification of a number of documents as SUNSI merely to exclude the public from participation in NRC proceedings where these documents could be referenced.⁶⁸

Of particular importance to this case, when documents containing SUNSI are at issue in an adjudicatory hearing, proceedings—that would otherwise be open to the public—involving these materials will be closed in order to ensure that the SUNSI is not disclosed. However, a wholesale closure of the proceeding, effectively shutting out the public, cannot be justified under the Richmond Newspapers test as long as there is material, not properly designated as SUNSI, to which the public should have access. Under Richmond Newspapers, it is essential that such proceedings be accessible to the public and that they be closed only where specific information—legitimately designated as SUNSI—must be discussed.

III. Board Analysis and Rulings on Intervenors' Contentions

1. Timeliness Standards Governing New Contentions

As a general rule, new contentions filed by an intervenor must comply with the timeliness standards of 10 C.F.R. § 2.309(f)(2). In this instance, however, Intervenors filed new contentions that implicate documents subject to the terms of the July 1, 2009 Protective Order. The Protective Order (signed by Intervenors, the Applicant, and NRC Staff), in turn, established time limits and deadlines for submitting new contentions based on the new information contained in the Mitigative Strategies Report. Section 14 of the Protective Order dictates that “[t]he [Intervenors] must file any proposed SUNSI contentions within 30 days after receipt of or

⁶⁸ Office of the Inspector General Semiannual Report to Congress, NUREG-1415, Vol. 19, No. 2 at 25 (Mar. 2007).

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

access to that information.⁶⁹ Intervenor asked for and were granted an extension of this deadline⁷⁰ and filed their new contentions on August 14, 2009.

In complying with the deadlines set forth in the Protective Order, Intervenor timely filed their new contentions. Contrary to the Applicant's argument that Intervenor's new contentions do not meet the timeliness requirements of 10 C.F.R. § 2.309(f)(2), because these new contentions are based on information subject to the Protective Order, timeliness is dictated by the terms of the Protective Order, under which the new contentions are timely.⁷¹

2. Standards for Contention Admissibility

As we discussed in detail in our August 27, 2009 Order, to litigate a contention, a petitioner who has established standing must also ensure each contention meets the six admissibility criteria of 10 C.F.R. § 2.309(f)(1).⁷²

3. Rulings on Contentions

Contention 1

Intervenor state in Contention 1:

The submittal is deficient because it omits any reference to the numbers and magnitudes of the fires and explosions that would be expected, for example, from the impact of a large commercial airliner. Without such reference there is an inadequate basis to determine whether the proposed mitigative strategies are adequate to comply with 10 C.F.R. § 50.54(hh)(2). Compliance with 10 C.F.R. § 50.54(hh)(2) cannot be determined without a determination of the full spectrum of damage states. At a minimum, the Applicant should be required to describe damage footprints both quantitatively and qualitatively, including composite damage footprints that are reasonably expected with an airstrike and include descriptions of anticipated physical damage, shock damage, fire damage, fire spread, radiation exposures to emergency responders and the public, and other effects such as failure of structural steel.⁷³

⁶⁹ Protective Order at 4.

⁷⁰ Licensing Board Order Extending Time for Filing New Contentions Based on SUNSI Information (July 14, 2009) (ADAMS Accession No. ML 091950690).

⁷¹ See 10 C.F.R. § 2.307 ("[T]ime fixed . . . for an act that is required or allowed to be done within a specified time, may be extended or shortened either by the Commission or the presiding officer for good cause . . .").

⁷² LBP-09-21, 69 NRC __ (slip op.) (Aug. 27, 2009).

⁷³ Intervenor's New Contentions at 5-6.

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

In this contention, intervenors take issue with the Applicant's Mitigative Strategies Report, and, in particular, with the Applicant's reliance on a guidance document, NEI 06-12, Rev. 2, to craft that Mitigative Strategies Report.⁷⁴ Intervenors argue that NEI 06-12 wrongly counsels applicants that they may employ a "flexible response" procedure.⁷⁵ To the contrary, intervenors claim that Applicant's failure "to discuss the scale (i.e., numbers and magnitudes) of the fires and explosions anticipated from initiating event(s) renders its submittal inadequate to meet the requirements of 10 C.F.R. § 52.80(d) and 10 C.F.R. § 50.54(hh)."⁷⁶ To support their position, intervenors rely on selected portions of the Statement of Considerations accompanying the promulgation of 10 C.F.R. § 50.54(hh)(2), which makes essentially this point: "Section 50.54(hh)(2) focuses on ensuring that the nuclear power plant's licensees will be able to implement effective mitigative measures for large fires and explosions including (but not explicitly limited to) those caused by the impacts of large commercial aircraft."⁷⁷ In addition, during oral argument, intervenors claimed that the "high level insights"⁷⁸ section of the NEI 06-12 guidance document and the Statement of Considerations for 10 C.F.R. §§ 50.54(hh)(1) and (2) both support their position that the Applicant is required to analyze the full spectrum of damage states in its Mitigative Strategies Report.⁷⁹

Furthermore, intervenors claim that, in order properly to assess the effects of the impact of a large commercial aircraft on STP Units 3 and 4, the Applicant should have followed another guidance document (albeit a draft one), NEI 07-13.⁸⁰ Although intervenors concede that NEI

⁷⁴ *Id.* at 8-9.

⁷⁵ *Id.* at 9.

⁷⁶ *Id.* at 8-9.

⁷⁷ *Id.* at 7 n.3 (quoting 74 Fed. Reg. 13,958 (Mar. 27, 2009)).

(b)(4)

⁷⁹ Tr. at 613, 621.

⁸⁰ Intervenors' New Contentions at 11.

EXEMPTION 4 NEI

~~CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER~~

07-13 was designed to enable applicants to comply with 10 C.F.R. § 50.150, the so-called aircraft impact design regulation,⁸¹ they nevertheless maintain the Applicant should have used NEI 07-13 in preparing this portion of its Mitigative Strategies Report by making the following statement:

Since one of the scenarios that 10 C.F.R. § 50.54(hh)(2) is required to address is an aircraft impact, and since regulatory guidance in NEI 07-13 is now available that includes a "best-estimate" model of the resulting damage footprint from such an impact, the Applicant must establish that the proposed mitigative measures would be effective in maintaining or restoring reactor containment, core cooling, and spent fuel pool cooling capabilities following an event that encompasses the full spectrum of damage states.⁸²

Intervenors clarified during oral argument that their reliance on NEI 07-13 is limited to demonstrating that "the part of 07-13 that does do a qualitative description of damaged states establish[es] that it is not an impossible task to do."⁸³ They further state: "[w]ithout baseline assumptions about the number and magnitudes of fires and explosions, there is no reasonable assurance that the mitigative strategies will be adequate."⁸⁴ As a consequence, Intervenors argue that the Applicant's failure to include this information renders the Applicant's submission incomplete, and hence raises a material issue of fact.⁸⁵

The Applicant responds that the plain language of "Sections 52.80(d) and 50.54(hh)(2) do[es] not require an applicant or licensee to identify or evaluate damage states,"⁸⁶ much less to include potential numbers and magnitudes of fires and explosions. Additionally, the Applicant asserts that the rulemaking record for these regulations does not support the Intervenors' argument. To the contrary, the Applicant maintains that it is obligated merely to describe "operational actions" not tied to any particular fire or explosion.⁸⁷ The Applicant claims that during the rulemaking for 10 C.F.R. §§ 50.54(hh)(2) and 52.80(d), the Commission explicitly

⁸¹ Id. at 11.

⁸² Id. at 12-13.

⁸³ Tr. at 616.

⁸⁴ Intervenors' New Contentions at 13.

⁸⁵ Id. at 6, 12.

⁸⁶ STP Answer New Contentions at 9.

⁸⁷ Id. at 12.

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

rejected a rule that would require evaluation of specific types of fires, explosions, and damage states.⁸⁸ Likewise, the Applicant argues, Intervenor's reliance on various remarks in the Statement of Considerations for 10 C.F.R. §§ 50.54(hh)(1) and 50.150 is misguided because those remarks are not applicable to 10 C.F.R. § 50.54(hh)(2), but solely apply to 10 C.F.R. § 50.54(hh)(1)⁸⁹—which is not at issue in Contention 1.⁹⁰ The Applicant also takes issue with Intervenor's attack on the Applicant's reliance on NEI 06-12 to craft its Mitigative Strategies Report,⁹¹ claiming the Commission has explicitly approved the use of NEI 06-12 to satisfy the requirements of 10 C.F.R. § 50.54(hh)(2).⁹²

NRC Staff sets forth additional grounds that it claims render Contention 1 inadmissible.⁹³ NRC Staff asserts that Intervenor fails to show how the Statement of Considerations for the Power Reactor Security Requirements rule "demonstrate[s] that the Application is missing relevant information required by law."⁹⁴ According to NRC Staff, the Commission did not intend either to limit beyond-design-basis security events to one cause or to establish aircraft impacts as a baseline.⁹⁵ Finally, NRC Staff asserts that this contention is inadmissible because it proffers additional or stricter requirements than those the regulation imposes.⁹⁶

Intervenor has not provided a legal basis for obligating the Applicant to present a full spectrum of damage states in its Mitigative Strategies Report. Neither the introductory "high level insights" section of NEI 06-12 nor the Statement of Considerations accompanying the

⁸⁸ Id. at 12 (citing 73 Fed. Reg. 19,445 (Apr. 10, 2008)).

⁸⁹ 10 C.F.R. § 52.80(d) requires Applicants to provide "a description and plans for implementation . . . as required by 10 CFR §50.54(hh)(2)" in the application. There is no requirement for § 50.54(hh)(1) to be addressed in the application. Hence these contentions address only § 50.54(hh)(2), and not § 50.54(hh)(1).

⁹⁰ STP Answer New Contentions at 13.

⁹¹ Id. at 16.

⁹² Id. at 17.

⁹³ Staff Answer New Contentions at 7.

⁹⁴ Id. at 9.

⁹⁵ Id.

⁹⁶ Id. at 12-13.

**-CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

rulemaking for 10 C.F.R. § 50.54(hh)(2) provide such a basis.⁹⁷ The "high level insights" on which Intervenor's rely do not help their argument because those "insights" are located in the introduction to NEI 06-12, which provides context and background material for the discussion in the succeeding text. They are not located in the guidance sections of the document that inform applicants of the information required to be addressed in the Mitigative Strategies Report. Likewise, suggestions in NEI 07-13 and in the Statement of Considerations for 10 C.F.R. § 50.54(hh)(1) that full compliance with 10 C.F.R. § 50.54(hh)(2) requires a full damage states analysis, including aircraft impact damage, are not instructive. Certainly, those provisions in the Statement of Considerations for 10 C.F.R. § 50.54(hh)(1), which do not discuss or have relevance to 10 C.F.R. § 50.54(hh)(2), were not meant to be used to interpret 10 C.F.R. § 50.54(hh)(2). Moreover, NEI 07-13 is still in draft form and has not been endorsed by the Commission.⁹⁸

Intervenor's cite portions of the Statement of Considerations for 10 C.F.R. § 50.54(hh)(2) where the adjective "effective" appears near or beside "mitigative measures."⁹⁹ Intervenor's improperly rely on this language to claim that effectiveness of mitigative strategies cannot be judged without an enumeration of damage states. Because these sources do not support Intervenor's argument that the Applicant must perform analysis of possible aircraft impact damage and other damage states, Intervenor's have failed to provide the legal support needed for this contention to be admissible.

⁹⁷ Although some NRC-created regulatory guidance documents deserve special consideration in Licensing Board proceedings, industry guidance documents do not. See Entergy Nuclear Vermont Yankee, LLC, (Vermont Yankee Nuclear Power Station), LBP 08-25, 68 NRC 763, 868-69 (2008).

⁹⁸ The Statement of Considerations does, however, note that "(c)urrent reactor licensees have already developed and implemented procedures that comply with the 50.54(hh)(2) requirements," without considering a full spectrum of damage states, and implemented procedures were reviewed using NEI 06-12 and interim staff guidance. See 74 Fed. Reg. at 13,957; Tr. at 626-27.

⁹⁹ Tr. at 628.

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

In short, intervenors have failed to provide a legal basis for obligating the Applicant to address "the full spectrum of damage states," much less the impact of a large aircraft, in the Mitigative Strategies Report. Thus, this contention is inadmissible under 10 C.F.R. § 2.309(f)(1)(vi).

Contention 2

Intervenors state in Contention 2:

According to the submittal, Phase 1 mitigative strategies are dependent on yet to be completed assessments, evaluations, action plans, and procedures that will not be completed until near the end of construction. The submittal does not specify that the subject assessments, evaluations, etc. will be done based on the full spectrum of damage states. The assessments, evaluations, etc. will evidently determine the scope of the Phase 1 fire fighting strategy and therefore must be done with the full spectrum of damage states in order to determine whether the proposed fire suppression strategies are adequate.¹⁰⁰

Intervenors state that "the arguments and authorities related to Contention 1 are incorporated by reference."¹⁰¹ Additionally, intervenors argue that it is unreasonable for the Applicant to assume that any missing assessments or evaluations can be delayed until construction is nearly completed. As a consequence, intervenors claim that the Applicant should complete these assessments at this stage of the licensing process in order to determine the Applicant's compliance with the requirements of 10 C.F.R. § 50.54(hh)(2).¹⁰² Intervenors assert that completing the assessments now is reasonable because the Applicant will need such evaluations to comply with the aircraft impact rule, 10 C.F.R. § 50.150.¹⁰³

In addition to incorporating by reference its opposition to Contention 1,¹⁰⁴ the Applicant responds that "the plain language of Section 52.80(d) does not require implementation of regulatory strategies (such as development of action plans and procedures for mitigative

¹⁰⁰ Intervenors' New Contentions at 14.

¹⁰¹ Id.

¹⁰² Id.

¹⁰³ Id. at 14 n.9.

¹⁰⁴ NRC Staff also opposes Contention 2 for the same reasons it opposes Contention 1. See Staff Answer New Contentions at 16.

~~CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION~~
~~WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER~~

strategies) at the COLA stage.¹⁰⁵ In addition, the Applicant argues that Intervenor have failed to demonstrate that the Applicant is legally obligated to complete its assessments and action plans now.¹⁰⁶ The Applicant states that, instead, it may develop mitigative procedures after the COL is issued, at which point NRC Staff will examine those procedures.¹⁰⁷ NRC Staff argues essentially the same points as Applicant.¹⁰⁸

In our view, Contention 2 is a dispute about timing. On the one hand, Intervenor argue that compliance with 10 C.F.R. § 50.54(hh)(2) requires full “assessments, evaluations, action plans, and procedures” for mitigative strategies to be completed at the application stage.¹⁰⁹ On the other hand, the Applicant and NRC Staff argue that the Applicant need only provide descriptions of mitigative strategies with the application because detailed implementation occurs at a much later point in the COLA process.¹¹⁰ Intervenor have not provided a legal basis for requiring, at this juncture, that the Applicant complete its assessments, evaluations, action plans, and procedures based on the full spectrum of damage states. Intervenor also argue that the Applicant’s future compliance with the aircraft impact rule, 10 C.F.R. § 50.150, requires the Applicant to make a full assessment of potential fires and explosions at this stage of the licensing process. If we were to adopt Intervenor’s interpretation of 10 C.F.R. § 50.54(hh)(2)—that the Applicant must include an analysis of all potential aircraft impacts as part of its application—we would render the aircraft impact rule superfluous. Additionally, the Commission’s Statement of Considerations that accompanied the rulemaking for 10 C.F.R. § 52.80(d) makes clear that mitigative strategies analyses need not be completed until after the plant is built.¹¹¹ There, the Commission directed NRC Staff to “review[] the program description

¹⁰⁵ STP Answer New Contentions at 20.

¹⁰⁶ Id.

¹⁰⁷ Id. at 21.

¹⁰⁸ Staff Answer New Contentions at 14-16.

¹⁰⁹ Intervenor’s New Contentions at 14.

¹¹⁰ Tr. at 694-95.

¹¹¹ 10 C.F.R. § 52.80(d) requires Applicants to provide “a description and plans for implementation . . . as required by 10 C.F.R. § 50.54(hh)(2)” in the application. We understand

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

provided in the application as part of the licensing process and perform [] subsequent inspections of procedures and plant hardware to verify implementation."¹¹² To the extent this contention seeks requirements more extensive than those imposed by Commission regulations, it must be rejected as a collateral attack on the regulations.¹¹³ Because the Applicant's Mitigative Strategies Report contains the type of description and implementation plan that 10 C.F.R. § 52.80(d) envisions, and because Intervenors have failed to provide any legal or factual support requiring the Applicant to undertake full damage states analysis at this stage, this contention is inadmissible for failure to satisfy 10 C.F.R. § 2.309(f)(1)(v) and (vi).

Contention 3

Intervenors state in Contention 3:

[Redacted] (b)(4)
[Redacted] However, there is no quantitative or qualitative description of the "event" nor is there a stated commitment to evaluate the dose projection models considering the full spectrum of damage states.¹¹⁴

*EXEMPTED ~ 4
SOUTH TEXAS*

Intervenors argue that, unless the plan includes a "detailed and accurate model based on the full spectrum of damage states, the Applicant cannot demonstrate that its plan for mitigating LOLAs [Loss of Large Areas] can be effectively executed without subjecting on-site responders to excessive radiation exposure."¹¹⁵

this contention to be challenging the adequacy of the description of the mitigative strategies. We note, however, that because 10 C.F.R. § 50.54(hh)(2) would only require the Applicant to develop the actual guidance and mitigative strategies as a condition of its license (i.e., after the license issues), it does not appear that interested persons would ever have an opportunity to challenge specific guidance or mitigative strategies as inadequate.

¹¹² 74 Fed. Reg. at 13,955.

¹¹³ See Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Units 2 and 3), LBP-01-10, 53 NRC 273, 286-87 (2001); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982).

¹¹⁴ Intervenors' New Contentions at 15.

¹¹⁵ Id.

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

In addition to incorporating by reference its opposition to Contention 1 and 2,¹¹⁶ the Applicant responds that neither NEI 06-12 nor 10 C.F.R. §§ 50.54(hh)(2) and 52.80(d) obligate STP to conduct dose modeling using the full spectrum of damage states.¹¹⁷ The Applicant also takes issue with Intervenors' reliance on the declaration of Edwin S. Lyman, Ph.D, which Applicant claims does not contain any "analysis or factual statements whatsoever" in support of Intervenors' position.¹¹⁸

NRC Staff argues that, although they claim the Applicant's mitigative measures will place emergency responders in situations that will result in major exposures, Intervenors fail to provide factual support for this notion.¹¹⁹

Contention 3 is inadmissible because 10 C.F.R. § 50.54(hh)(2) does not mandate that the Applicant include a dose projection model and a quantitative radiation impact study in its Mitigative Strategies Report. Indeed, neither 10 C.F.R. § 50.54(hh)(2) nor 10 C.F.R. § 52.80(d) contains any requirement to minimize dose. As a result, Contention 3 fails to satisfy 10 C.F.R. § 2.309(f)(1)(vi). Moreover, the declaration of Intervenors' expert, Edwin Lyman, Ph.D., fails to provide any factual explanation as to why dose projection model evaluations or other radiation studies are required during this part of the COLA process.¹²⁰ Because Intervenors have not provided a factual or legal basis for Contention 3, it is inadmissible for failure to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).

Contention 4

Intervenors state in Contention 4:

[Redacted] (b)(4)

However, the MST does not specify whether the LOLA "event" commitments/strategies are or will be developed based on a damage footprint of sufficient extent and severity to accommodate the likely impact(s) of large commercial

*Exemption by NRC/DOE
South Texas*

¹¹⁶ STP Answer New Contentions at 22.

¹¹⁷ Id.

¹¹⁸ Id. at 23.

¹¹⁹ Staff Answer New Contentions at 17-18.

¹²⁰ See Intervenors' New Contentions, Lyman Decl. ¶ 4 (Aug. 14, 2009).

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

airliner(s) and/or the full spectrum of damage states. Accordingly, there is no way to determine whether the proposed mitigative strategies are adequate.¹²¹

Intervenors argue that the Mitigative Strategies Report is incomplete because the Applicant did not include specifications of the damage states that can be expected in a LOLA event.¹²² To cure this deficiency, Intervenors contend the Applicant must submit a "comprehensive analysis that fully accounts for and discusses how each [strategy] is dependent on the magnitude of the initiating event(s)."¹²³

The Applicant notes that the Commission-endorsed guidance in NEI 06-12 "provides for development of a 'flexible response capability' for addressing a variety of extreme conditions involving the spent fuel pool and reactor."¹²⁴ The Applicant maintains it should not be required to develop more specific plans than those set forth in the Mitigative Strategies Report because the plain language of 10 C.F.R. § 52.80(d) does not require detailed study at the COLA stage, but instead contemplates further evaluation of mitigative strategies in the future.¹²⁵

NRC Staff agrees with the Applicant's position that there is no legal requirement to complete these evaluations at the present time¹²⁶ based on the full spectrum of damage states.¹²⁷ Thus, NRC Staff contends, Contention 4 lacks a regulatory basis, it is an impermissible attack on the Commission's regulation, and it is inadmissible for the same reasons Contention 1 is inadmissible.¹²⁸

¹²¹ Intervenors' New Contentions at 16-17.

¹²² Id. at 17.

¹²³ Id. at 18.

¹²⁴ STP Answer New Contentions at 25-26.

¹²⁵ Id. at 26.

¹²⁶ "The Commission views the mitigative strategies as similar to those operational programs for which a description of the program is provided and reviewed by the Commission as part of the combined license application and subsequently the more detailed procedures are implemented by the applicant and inspected by the NRC before plant operation." Staff Answer New Contentions at 21 (citing 74 Fed. Reg. at 13,933).

¹²⁷ Staff Answer New Contentions at 20. NRC Staff also notes that Intervenors do not actually challenge the adequacy of the mitigative strategies; rather, they simply state that there is no way to determine if the strategies are adequate without information regarding the number and magnitude of fires and explosions. Id. at 21.

¹²⁸ Staff Answer New Contentions at 21.

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

As we explained in our discussion regarding Contention 1,¹²⁹ compliance with 10 C.F.R.

§ 50.54(hh)(2) does not require the Applicant to present a full spectrum of damage states in its Mitigative Strategies Report. Thus, similar to Contention 1, Contention 4 is inadmissible because Intervenors have not established a legal basis for obligating the Applicant to specify damage states that can be expected in LOLA events, as 10 C.F.R. § 2.309(f)(1)(vi) requires.

Contention 5

Intervenors state in Contention 5:

(b)(4)

Accordingly, the submittal should reconcile the premise that no heroic actions will be required with the recognition that the mitigative measures may be unsuccessful, considering the full spectrum of damage states, and that heroic actions would in fact be required to actually mitigate the effects of fires and explosions that are not controlled by use of the Applicant's mitigative measures.¹³⁰

In Contention 5, Intervenors assert that extraordinary individual or collective actions would be required to suppress nuclear plant fires that do not respond to the mitigative measures in the COLA.¹³¹ In addition to incorporating by reference their arguments and authorities in support of Contentions 1, 2, 3, and 4 regarding the efficacy of the Mitigative Strategies Report,¹³² Intervenors assert that, during a LOLA event, responders who take extraordinary actions will experience significant radiological exposures. Yet, Intervenors claim the Applicant's Mitigative Strategies Report neglects to include procedures "to determine which individual(s) would receive higher doses of radiation" or other radiation-related information.¹³³ To support their assertion that responders might be exposed to radiation if the mitigative strategies are implemented as described, as they did for Contention 1, Intervenors rely on the "high level

¹²⁹ See *supra* p. 20-22.

¹³⁰ Intervenors' New Contentions at 18.

¹³¹ *Id.*

¹³² *Id.* at 19.

¹³³ *Id.* at 18-19.

EXEMPTION 4 NRC

~~CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 4, 2009 PROTECTIVE ORDER~~

insights" section prefacing NEI 06-12.¹³⁴ Intervenors claim that one of these "high level insights" suggests that responses created using the guidance in NEI 06-12 "may not be effective."¹³⁵ Intervenors also fault the Mitigative Strategies Report for failing to provide details about the training that will be afforded such responders.¹³⁶ Thus, Intervenors postulate, the Applicant must supplement its Mitigative Strategies Report with potential radiation exposure and responder training information based on the full spectrum of damage states.¹³⁷

The Applicant asserts that nothing in NEI 06-12 or 10 C.F.R. §§ 50.54(hh)(2) and 52.80(d) require it to present radiation exposure information or responder training information in the Mitigative Strategies Report.¹³⁸ The Applicant further claims that Intervenors have not identified any legal requirement obligating the Applicant to include this information regarding responder radiation exposures and training, and so this contention is inadmissible.¹³⁹

At the application stage, 10 CFR § 52.80 (d) requires only "a description and plans for implementation of guidance and strategies . . . as required by 10 CFR § 50.54(hh)(2)", and neither 10 CFR § 52.80 (d) nor 10 CFR § 50.54(hh)(2) contain any explicit mention of or requirement for radiation exposure information. Because this contention does not identify a legal basis for requiring the Applicant to supply the allegedly missing radiation exposure and emergency responder information, it does not meet the admissibility standard set forth in 10 C.F.R. § 2.309(f)(1)(vi). Contention 5, like Contentions 1 and 4, is premised on the notion that the Applicant must consider the full spectrum of damage states in its mitigative strategies.¹⁴⁰ As

¹³⁴ Intervenors' Response at 19.

¹³⁵ *Id.* at 20.

¹³⁶ Intervenors' New Contentions at 19.

¹³⁷ Intervenors' Response at 20.

¹³⁸ STP Answer New Contentions at 27-28.

¹³⁹ *Id.* at 28. NRC Staff also argues that Contention 5 is inadmissible to the same extent as Contention 1 because Intervenors do not cite a rule or other legal requirement that the Applicant must supply this information. Staff Answer New Contentions at 23.

¹⁴⁰ *See supra* pp. 22, 28. Here, Intervenors also argue that, because some plant fires could require "extraordinary actions," the Mitigative Strategies Report must compensate for that by considering potential heroic actions within the full spectrum of damage states. Intervenors base this assumption on an introductory bullet point (under the heading "high level insights")

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

we have previously noted, 10 C.F.R. §§ 50.54 (hh)(2) and 52.80(d) do not require a COL applicant to submit this type of information. As a consequence, Contention 5 is inadmissible.

Contention 6

Intervenors state in Contention 6:

The South Texas Project 3 & 4 Mitigative Strategies Report is deficient because it does not address strategies suitable for the particular circumstances associated with LOLAs occurring during reactor outages. Therefore, it does not comply with the requirements of 10 C.F.R. § 50.54(hh)(2), which applies both during full-power operation and during outages.¹⁴¹

Intervenors insist that the Mitigative Strategies Report does not identify effective strategies for mitigating LOLA events during a reactor outage.¹⁴² Intervenors claim that, in order to comply fully with 10 C.F.R. § 50.54(hh)(2), the Mitigative Strategies Report must consider a plant outage and evaluate how the strategies for full-power operation may have to be modified during an outage.¹⁴³

The Applicant responds that Contention 6 is merely a rephrasing of the same arguments in Contention 1 that seek to force the Applicant to evaluate the full spectrum of damage states, and it should be dismissed for the same reasons.¹⁴⁴ The Applicant asserts that, even though NEI 06-12 does not require it to evaluate various plant conditions such as reactor outages at the COL application stage, it nevertheless considered "worst case scenarios" in its Mitigative Strategies Report.¹⁴⁵ Specifically, the Applicant claims, its mitigative strategies assume even more aggravated conditions—operating at full capacity—than would be the case if there were a reactor outage, and thus "our mitigative strategies are available in either case, whether it's

accompanying the substantive mitigative guidance in NEI 06-12 that notes certain responses will not be successful under the full spectrum of potential damage states. Even if this high level insight were construed to encourage applicants to consider extraordinary actions in their mitigative strategies, a regulatory guidance document cannot impose requirements that are not specified in the plain language of a regulation, as we noted in our discussion of Contention 1.

¹⁴¹ Intervenors' New Contentions at 19.

¹⁴² Intervenors' New Contentions at 20.

¹⁴³ Id.

¹⁴⁴ STP Answer New Contentions at 31.

¹⁴⁵ Id. at 31-32; Tr. at 729.

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

outage or non-outage at full power operation."¹⁴⁶ Therefore, the Applicant argues, Intervenors' concerns about potential problems in the event of a reactor outage "are inconsistent with the Commission's intent," are "not adequately supported", and "do not demonstrate a genuine dispute."¹⁴⁷ NRC Staff opposes Contention 6 by asserting that Intervenors have failed to identify a regulatory basis "for their assertion that an Applicant is required to have mitigative strategies for both operations and outages."¹⁴⁸

Contention 6 is inadmissible because it lacks regulatory and factual support. 10 C.F.R. § 50.54(hh)(2) requires the development of mitigative strategies that are "intended to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities under the circumstances associated with loss of large areas of the plant due to explosions or fire" Intervenors do not provide any factual basis for requiring the Applicant to evaluate LOLA during a reactor outage. Consequently, Contention 6 fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi) because Intervenors have failed to provide a legal or factual requirement to support their claim.

Contention 7

Intervenors state in Contention 7:

The submittal assumes "abundant" water supplies are available for cooling and fire suppression. However, there is no discussion of the number or magnitude of fires that would require water nor the full spectrum of damage states that would require fire suppression and cooling functions. There is no evidentiary support for an assumption by the Applicant that adequate supplies or pumping capacity is available simultaneously for emergency reactor cooling, SFP cooling and suppressing multiple fires.¹⁴⁹

¹⁴⁶ Tr. at 728-29.

¹⁴⁷ STP Answer New Contentions at 32-33.

¹⁴⁸ Staff Answer New Contentions at 26-27. NRC Staff also argues that there is no need for applicants to consider the potential for plant equipment to be out of service for routine maintenance because NEI 06-12 states that for purposes of creating mitigative strategies, plant systems are assumed to be operating at 100% capacity. *Id.* at 27.

¹⁴⁹ Intervenors' New Contentions at 21.

**~~CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER~~**

Intervenors argue that the Applicant's Mitigative Strategies Report erroneously omits information about total pumping capacity and fire suppression capacity.¹⁵⁰ To support their position, Intervenors incorporate their previous arguments about the necessity of a full damage states analysis for all mitigative strategies.¹⁵¹

The Applicant asserts that Intervenors mischaracterize its Mitigative Strategies Report, alleging it clearly states that abundant water supplies exist.¹⁵² The Applicant further claims its Mitigative Strategies Report lists specific water storage tanks and pumping apparatus that would be used for cooling and fire suppression.¹⁵³ Finally, the Applicant argues Contention 7 is inadmissible for the same reasons it asserted with respect to the preceding six contentions.¹⁵⁴

NRC Staff opposes admission of Contention 7, asserting Intervenors have failed to allege "any factual or expert support for the position that the total pumping capability or the fire suppression capacity are inadequate."¹⁵⁵ In addition, NRC Staff notes the Intervenors claim that "the Applicant does not discuss compromised water supplies nor pumping capacity under all damage states," but failed to provide a legal basis for the need for this information.¹⁵⁶

Contention 7 is inadmissible because Intervenors have failed to offer a basis for their claim that the Applicant's discussion of fire suppression and reactor cooling strategies in the Mitigative Strategies Report is inadequate. To admit this contention, 10 C.F.R. § 2.309(f)(1)(v) requires factual support or an expert opinion to bolster Intervenors' claims of inadequacy. Likewise, although Intervenors argue that the mitigative strategies should consider compromised water supplies and pumping capacity under the full spectrum of damage states, they have not identified a regulation or other legal requirement that this information be included in the Mitigative Strategies Report, as 10 C.F.R. § 2.309(f)(1)(vi) requires. Additionally, to the

¹⁵⁰ Id.

¹⁵¹ Id.

¹⁵² STP Answer New Contentions at 36-38; Tr. at 738-39.

¹⁵³ Id. at 38.

¹⁵⁴ Id. at 36.

¹⁵⁵ Staff Answer New Contentions at 29.

¹⁵⁶ Id.

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

extent Contention 7 seeks mitigative strategies that are more rigorous than those imposed by 10 C.F.R. § 50.54(hh)(2), it must be rejected as a collateral attack on the regulation, in contravention of 10 C.F.R. § 2.335.¹⁵⁷

4. Request for Subpart G Proceeding

Intervenors' request for a formal adjudication of their contentions pursuant to 10 C.F.R. § 2.700 is denied as moot because the seven contentions are inadmissible.

Order

For the foregoing reasons:

- A. Within 20 days of the issuance of this Order, NRC Staff shall provide Intervenors with a copy of all non-SUNSI portions of ISG-016.
- B. Within 30 days of the issuance of this Order, NRC Staff shall reevaluate Intervenors' request for access to ISG-016, using the standard for access to SUNSI in a Licensing Board proceeding articulated herein, and file a memorandum explaining its reevaluation.
- C. New Contentions 1 through 7 are inadmissible and, as such, will not be further considered in this proceeding.

The dismissal of Contentions 1 through 7 is without prejudice to Intervenors' right to file new or amended contentions based upon any information they might subsequently obtain as the result of a grant of access to material contained in ISG-016.

This Order is subject to appeal to the Commission in accordance with 10 C.F.R. § 2.311. Petitions for review meeting applicable requirements set forth in that section must be filed within ten (10) days of service of this Memorandum and Order.

¹⁵⁷ See Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Units 2 and 3), LBP-01-10, 53 NRC 273, 286-87 (2001).

~~CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION~~
~~WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER~~

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael M. Gibson, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

/RA/

Dr. Randall J. Charbeneau
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 29, 2010

~~CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION~~
~~WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER~~

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
SOUTH TEXAS PROJECT NUCLEAR) Docket Nos. 52-012-COL and 52-013-COL
OPERATING COMPANY)
)
(South Texas Project Units 3 and 4))
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ORDER (RULINGS ON THE ADMISSIBILITY OF NEW CONTENTIONS AND ON INTERVENORS' CHALLENGE TO STAFF DENIAL OF DOCUMENTARY ACCESS) (LBP10-02) have been served upon the following persons by the Electronic Information Exchange.

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, DC 20555-0001

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop - O-15 D21
Washington, DC 20555-0001

Michael M. Gibson, Chair
Administrative Judge
E-mail: michael.gibson@nrc.gov

Sara Kirkwood, Esq.
Michael Spencer, Esq.
Jessica Bielecki, Esq.
E-mail:

Gary S. Arnold
Administrative Judge
E-mail: gsa1@nrc.gov

Sara.Kirkwood@nrc.gov
michael.spencer@nrc.gov
jab2@nrc.gov

Randall J. Charbeneau
Administrative Judge
E-mail: Randall.Charbeneau@nrc.gov

OGC Mail Center : OGCMailCenter@nrc.gov

Wen Bu, Law Clerk
Kara Wenzel, Law Clerk
E-mail: wen.bu@nrc.gov
kara.wenzel@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

Office of the Secretary of the Commission
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov

**CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER JULY 1, 2009 PROTECTIVE ORDER**

Docket Nos. 52-012-COL and 52-013-COL
ORDER (RULINGS ON THE ADMISSIBILITY OF NEW CONTENTIONS AND ON
INTERVENORS' CHALLENGE TO STAFF DENIAL OF DOCUMENTARY ACCESS)(LBP10-02)

Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004
Counsel for the Applicant
Stephen J. Burdick, Esq.
Steven P. Frantz, Esq.
Alvin Gutterman, Esq.
John E. Matthews, Esq.
E-mail:
sburdick@morganlewis.com
sfrantz@morganlewis.com;
agutterman@morganlewis.com
jmatthews@morganlewis.com

Sustainable Energy & Economic
Development (SEED) Coalition
Eliza Brown, Clean Energy Advocate
1303 San Antonio #100
Austin, Texas 78701
E-mail: eliza.seedcoalition@gmail.com

Sustainable Energy and Economic
Development (SEED) Coalition
Robert V. Eye, Esq.
Kauffman & Eye
112 SW 6th Avenue, Suite 202
Topeka, Kansas 66603
E-mail: bob@kauffmaneye.com

[Original signed by Nancy Greathead]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 29th day of January 2010.