

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

LBP-22-02

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

G. Paul Bollwerk, III, Chair  
William J. Froehlich  
Dr. Sue H. Abreu

In the Matter of

NUCLEAR FUEL SERVICES, INC.

(License Amendment Application)

Docket No. 70-143-LA

ASLBP No. 22-977-01-LA-BD01

October 19, 2022

MEMORANDUM AND ORDER  
(Ruling on Appeal from NRC Staff's  
Denial of Request for Access to Nonpublic Information)

Not infrequently, a license application submitted to the U.S. Nuclear Regulatory Commission (NRC) will contain information that the applicant wants excluded from public release because of confidentiality concerns. When the NRC Staff agrees with the applicant that the material in question should not be released to the public, potential hearing parties are then given the opportunity to request access to that nonpublic information for the purpose of preparing a hearing request challenging the license application. Such a request is the focus of the proceeding now before this Licensing Board.

On November 18, 2021, BWXT Nuclear Fuel Services, Inc. (NFS) submitted a request to amend the existing 10 C.F.R. Part 70 license for its Erwin, Tennessee nuclear fuel fabrication facility to perform new processes associated with uranium purification and conversion to uranium metal.<sup>1</sup> The November 2021 application, as supplemented on February 24, 2022,

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<sup>1</sup> See Letter from Tim Knowles, Director, Safety and Safeguards, NFS, to Director, Office of Nuclear Material Safety and Safeguards (NMSS), NRC at portable document format

includes several supporting documents, eight of which have been withheld from public release pursuant to 10 C.F.R. § 2.390 on the basis that they contain Sensitive Unclassified Non-Safeguards Information (SUNSI).<sup>2</sup>

Pending before this Licensing Board is a September 28, 2022 motion by Park Overall, a self-represented potential party to the NFS license amendment application proceeding. In her motion Ms. Overall seeks the reversal of the NRC Staff's September 21, 2022 denial of her request, submitted on September 12 and modified on September 14, that she be provided with access to all nonpublic information associated with the NFS application.<sup>3</sup> In a reply pleading dated October 3, 2022, the NRC Staff asserts that the Board should reject Ms. Overall's SUNSI access appeal.<sup>4</sup>

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(PDF) 1–2 (Nov. 18, 2021) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML21327A099) [hereinafter NFS License Amendment Application]. In several instances in this ruling in which a cited document has no marked pagination, the citation is to the document's pagination as it resides as a PDF file in the agency's ADAMS document management system or the associated Electronic Hearing Docket.

<sup>2</sup> See id. at PDF 2–3, 5–6; Letter from Tim Knowles, Director, Safety and Safeguards, NFS, to Director, NMSS, NRC at PDF 1–2 (Feb. 24, 2022) (ADAMS Accession No. ML22066B004) [hereinafter NFS License Amendment Application Supp. 1]; Letter from Tim Knowles, Director, Safety and Safeguards, NFS, to Director, NMSS, NRC at PDF 1–2 (Feb. 24, 2022) (ADAMS Accession No. ML22069A315) [hereinafter NFS License Amendment Application Supp. 2].

<sup>3</sup> See Letter from Park Overall to E. Roy Hawken, Chief Administrative Judge at 1 (Sept. 28, 2022) [hereinafter SUNSI Access Denial Appeal]; see also Letter from James R. Downs, Senior Project Manager, NMSS, to Park Overall (Sept. 21, 2022) [hereinafter Staff SUNSI Access Denial]; id., encl. 1 (Letter from Park Overall to Office of the Secretary & Office of the General Counsel, NRC (Sept. 14, 2022) (with redactions)) [hereinafter Initial SUNSI Access Request]. Although Ms. Overall submitted her initial SUNSI access request on September 12, because it contained personally identifiable information (PII), on September 14 she resubmitted the request with the PII redacted. See Staff SUNSI Access Denial at 1 n.1. In this decision, we reference the publicly available redacted version of her SUNSI access request.

<sup>4</sup> See NRC Staff Reply to Appeal of Denial of SUNSI Access Request (Oct. 3, 2022) at 1 [hereinafter Staff SUNSI Access Appeal Denial Reply]. We note that this Staff pleading was provided without pagination, which is generally disfavored for pleadings and other participant-drafted litigation submissions.

For the reasons set forth below, we deny Ms. Overall's appeal as we conclude that her SUNSI access request fails to meet the established Commission standard governing a potential party's access to nonpublic information.

## I. BACKGROUND

### A. NFS License Amendment Application

As noted previously, in a November 18, 2021 letter to the agency, NFS requested an amendment to its existing 10 C.F.R. Part 70 special nuclear materials license, SNM-124. See NFS License Amendment Application at PDF 1. If granted, the amendment would allow uranium purification and conversion services to be conducted at its Erwin, Tennessee nuclear fuel fabrication facility. See id. at PDF 5. According to the NFS application, the license amendment request stems from a contract awarded to NFS by the U.S. Department of Energy's National Nuclear Security Administration for the "U-Metal Project." Id. at PDF 1. That contract, the amendment application indicates, is intended to bridge the gap between the shutdown of the Erwin facility's Y-12 legacy uranium processing equipment and the transition to a new facility that uses new electrorefining technology to purify high-enriched uranium metal. See id. at PDF 1–2.

As the application reflects, in accordance with 10 C.F.R. § 70.72(c), NFS is required to seek agency approval of the changes necessary to implement the new U-Metal process, including addressing the baseline design criteria set forth in 10 C.F.R. § 70.64. See id. at PDF 4–5. To address these regulatory requirements, attached to the NFS application are (1) a proposed update to the general process description in Chapter 1 of NFS material license SNM-124 that accounts for U-Metal operations; (2) a proposed integrated safety analysis summary for the U-Metal Project; (3) a proposed updated emergency plan that addresses two new emergency scenarios; (4) a proposed supplemental environmental report evaluating the environmental impacts associated with the addition of the U-Metal Project; and (5) an estimate

of the decommissioning costs related to the U-Metal process. See id. at PDF 2–3. Of these attachments, NFS identified its proposed integrated safety analysis summary (attachment 2) and proposed updated emergency plan (attachment 3) as containing sensitive information, its proposed decommissioning cost estimate (attachment 5) as containing proprietary information, and all three of these documents and its proposed supplemental environmental report (attachment 4) as containing “trade secrets or commercial information” such that they should remain nonpublic per 10 C.F.R. § 2.390(a). See id. at PDF 5; id., aff. ¶¶ A–B (Aff. of Tim Knowles, Director, Safety and Safeguards, NFS (Nov. 18, 2021)).

On January 22, 2022, the NRC Staff sent NFS a request for supplemental information (RSI) regarding fire safety, material control and accounting of special nuclear material, financial assurance relative to the proposed NFS decommissioning funding plan and cost estimate, and structural and natural phenomena hazards analyzes for certain components of the proposed integrated safety assessment summary, along with a request for a version of the proposed supplemental environmental report that could be made available to the public.<sup>5</sup> NFS answered this request in a February 24, 2022 letter that included an attached RSI response, described by NFS as containing sensitive information meriting nonpublic treatment, along with a separate enclosure consisting of a public version of the supplemental environmental report.<sup>6</sup> Further, on that date NFS provided a separate letter with three additional enclosures supporting its license amendment application, including a seismic evaluation of the NFS facility, a seismic evaluation of NFS facility equipment, and a revised high-enriched uranium metal production facility

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<sup>5</sup> See Letter from James R. Downs, Senior Project Manager, NMSS, NRC, to Tim Knowles, Director, Safety and Safeguards, NFS, encl. at 1–5 (Jan. 22, 2022) ([RSI], Enterprise Project Identification Number: L-2021-LLA-0213) (ADAMS Accession No. ML22014A421).

<sup>6</sup> See NFS License Amendment Application Supp. 1 at PDF 1; id., encl. (NFS, Supplemental Environmental Report for Amendment of Special Nuclear Material License No. SNM-124 (Nov. 2021)) (ADAMS Accession No. ML22066B005).

Building 301 integrated safety assessment summary.<sup>7</sup> See NFS License Amendment Application Supp. 2 at PDF 2. NFS also requested that these three documents be treated as nonpublic under 10 C.F.R. § 2.390 as containing sensitive information. See id. at PDF 1; id., aff. ¶¶ A–B (Aff. of Tim Knowles, Director, Safety and Safeguards, NFS (Feb. 24, 2022)).

On March 25, 2022, the NRC Staff informed NFS that it had the information necessary to accept the NFS license amendment application and proceed with its detailed licensing review.<sup>8</sup> Just over a month later, on April 28, 2022, the NRC Staff issued a request for additional information (RAI) seeking material it deemed necessary to complete its detailed environmental review.<sup>9</sup> NFS's June 30, 2022 RAI response, which did not identify any of the information

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<sup>7</sup> These three nonpublic enclosures, along with the four nonpublic documents submitted in support of the November 21, 2021 license amendment application and the February 24, 2022 nonpublic NFS RSI response, are denominated in the Commission's August 31, 2022 hearing opportunity notice for the NFS license amendment application, along with their ADAMS accession numbers. See Nuclear Fuel Services, Inc., 87 Fed. Reg. 53,507, 53,508–09 (Aug. 31, 2022).

<sup>8</sup> See Letter from James R. Downs, Senior Project Manager, NMSS, NRC, to Timothy Knowles, Director, Safety and Safeguards, NFS at 1 (Mar. 25, 2022) (ADAMS Accession No. ML22080A238).

<sup>9</sup> See Letter from Jill S. Caverly, Senior Project Manager, NMSS, NRC, to Timothy Knowles, Director, Safety and Safeguards, NFS at 1 (Apr. 28, 2022) (ADAMS Accession No. ML22111A281). In conjunction with the Staff's detailed environmental review, its publicly available RAIs sought additional environmental impact information regarding 36 subject matter areas, including federal, state, and local regulatory requirements, permits, and authorizations; new facility construction; gaseous and liquid effluents associated with the U-Metal Project; any changes or additions to the NFS facility's radiological surveillance program; the decommissioning timeframe for the proposed action; potential land use impacts, including construction vehicle and non-paved area impacts; visual and scenic resource impacts; and impacts from the U-Metal Project associated with meteorology, climatology, air quality, noise, geology and soils, surface water and ground water resources, terrestrial and aquatic ecological resources, threatened and endangered species, historic and cultural resources, socioeconomic factors, public and occupational health, transportation, environmental justice, waste management; and the cumulative impacts of the U-Metal Project. See id., encl. at 1–6 ([RAIs] for the Development of the Environmental Assessment for the [NFS] License Amendment Request to SNM-124 Authorizing Uranium Purification and Conversion Services (U-Metal Project)).

provided as containing nonpublic trade secrets or commercial information, is fully available to the public without restriction or redaction.<sup>10</sup>

B. Ms. Overall's SUNSI Access Request

On April 27, 2022, one day prior to issuing its RAIs to NFS regarding its environmental review, the NRC Staff published a notice in the Federal Register indicating it had received the November 2021 NFS license amendment application.<sup>11</sup> Further, in accordance with Atomic Energy Act section 189a, 42 U.S.C. § 2239(a), the Staff's notice indicated that any person whose interest might be affected by the application could file a hearing request and petition for leave to intervene challenging that application within 60 days. See 87 Fed. Reg. at 25,055. On June 10, 2022, the Erwin Citizens Awareness Network, Inc. (ECAN), submitted a request for a three-month extension of this filing deadline, citing hardships related to the ongoing COVID-19 pandemic and lack of broadband Internet access, which the Secretary of the Commission granted in part in a June 24, 2022 order that extended the hearing petition filing deadline until July 27, 2022.<sup>12</sup> This was followed by a second ECAN extension request, dated July 26, 2022, seeking an additional three months within which to file a hearing petition.<sup>13</sup> In an August 8, 2022 order, the Secretary noted that the deadline for filing a hearing petition challenging the NFS application would be governed by a new hearing opportunity notice that the NRC Staff had advised was needed to outline the procedures by which a potential party could seek access to NFS SUNSI documents provided in support of the license amendment application. See Commission Order at 1–2.

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<sup>10</sup> See Letter from Tim Knowles, Director, Safety and Safeguards, NFS, to Director, NMSS, NRC at 1 (Jun. 30, 2022) (ADAMS Accession No. ML22193A034).

<sup>11</sup> See Nuclear Fuel Services, Inc., 87 Fed. Reg. 25,054, 25,054 (Apr. 27, 2022).

<sup>12</sup> See Commission Order (June 24, 2022) at PDF 1 & n.1 (unpublished).

<sup>13</sup> See Commission Order, attach. (Aug. 8, 2022) (unpublished) (Letter from Linda Cataldo Modica, President, ECAN, to Rochelle C. Bovol, Acting Secretary, Office of the Secretary (SECY), NRC (July 26, 2022)) [hereinafter Commission Order].

The NRC then published a hearing opportunity notice in the Federal Register on August 31, 2022, that, among other things, set an October 31, 2022 deadline for any hearing requests challenging the November 2021 NFS license amendment application, and incorporated an order setting forth the procedures by which a potential party could seek access to SUNSI documents provided in support of the NFS license amendment application. See 87 Fed. Reg. at 53,510–11.

Ms. Overall filed an initial, and then a redacted, request for access to all SUNSI documents regarding the NFS amendment application on September 12 and 14, 2022, respectively. See supra note 3. In her access request, Ms. Overall asserted the SUNSI materials were needed for two reasons. First, she maintained that because “the NRC has the Ketterer Report which ECAN commissioned,” she “would be very interested in what the NRC is willing to share with me.” Initial SUNSI Access Request at 3. Second, Ms. Overall requested she be given access to SUNSI materials because she maintains they will help her understand “the real purpose and function of the NRC” given that “[t]he NRC pulled out of the study by the National Academy of Sciences [(NAS)]” regarding the NFS facility, the result of which was that “no such studies have been done in this country to my knowledge.” Id.

On September 21, 2022, the NRC Staff denied Ms. Overall’s SUNSI request. See Staff SUNSI Access Denial at 1. Referencing the two criteria for obtaining SUNSI material—likelihood of establishing standing and legitimate need for SUNSI access—set forth in the Commission’s hearing opportunity notice, the NRC Staff acknowledged that, based on the representations in her SUNSI access request, there was a reasonable basis for concluding that Ms. Overall could establish standing to intervene in an adjudicatory proceeding regarding the efficacy of the NFS amendment application. See id. Nonetheless, the NRC Staff claimed that Ms. Overall had not met the second element of the standard because she failed to provide a sufficient basis to demonstrate that as a potential party she has “a legitimate need for access to SUNSI in this proceeding.” Id. at 2.

On September 28, 2022, Ms. Overall appealed the NRC Staff's SUNSI access determination, which the Commission referred to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for appropriate action.<sup>14</sup> On September 29, 2022, this Licensing Board was established to preside over Ms. Overall's appeal.<sup>15</sup> On October 3, 2022, the NRC Staff filed a reply to her appeal, stating that "[a]lthough [Ms. Overall] may meet the standing criterion, she does not meet the 'need' criterion . . . . Therefore, her appeal . . . should be denied." Staff SUNSI Access Appeal Denial Reply at PDF 5.

## II. DISCUSSION

In undertaking our de novo review of Ms. Overall's appeal,<sup>16</sup> as noted in section I.B above, the Commission's standard governing a potential party's ability to obtain access to license application-associated SUNSI materials looks to whether the requestor can (1) demonstrate there is a reasonable basis to believe that as the potential party they are likely to establish standing to participate in the licensing proceeding at issue; and (2) establish a legitimate need for access to any SUNSI documentation. 87 Fed. Reg. at 53,510. For the purpose of litigating Ms. Overall's access request, the NRC Staff does not contest whether Ms. Overall or Sandra Miller, who also was identified as a potential party in Ms. Overall's initial SUNSI access request, would fulfill the standing portion of this two-part inquiry. See Staff SUNSI Access Appeal Denial Reply at PDF 2 n.7. For our part, we conclude that, in the context of this SUNSI access request proceeding,<sup>17</sup> we need not determine whether the NRC Staff's

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<sup>14</sup> See SUNSI Access Denial Appeal at 1; E-mail from Clara (Rica) Sola, SECY, NRC, to E. Roy Hawken, Chief Administrative Judge (Sept. 28, 2022, 3:02 p.m. EDT).

<sup>15</sup> See Nuclear Fuel Services, Inc.: Establishment of Atomic Safety and Licensing Board, 87 Fed. Reg. 60,420 (Oct. 5, 2022).

<sup>16</sup> See Susquehanna Nuclear, LLC (Susquehanna Steam Electric Station, Units 1 and 2), LBP-16-12, 84 NRC 148, 158 (2016), aff'd, CLI-17-4, 85 NRC 59 (2017).

<sup>17</sup> In establishing party status for an intervenor submitting a hearing petition, it is generally recognized that, regardless of concessions by other litigants, a licensing board has an

concession on this standing factor was appropriate because we find that the second element—i.e., whether there has been a sufficient showing of a legitimate need for SUNSI material associated with the NFS license amendment application—has not been met.<sup>18</sup>

As the Commission has emphasized regarding this second criterion, a potential party is required to “explain how the requested SUNSI is necessary for meaningful participation in the proceeding” by including

- (1) an explanation of the importance of the requested information to the proceeding, i.e., how the information relates to the license application or to NRC requirements or guidance, and how it will assist the requester in seeking intervention; and (2) an explanation of why existing publicly available versions of the application would not be sufficient.<sup>19</sup>

Further, according to the Commission, “whether a request for SUNSI sufficiently demonstrates a ‘need’ for the information will depend on the particular facts and circumstances presented.”

South Texas, CLI-10-24, 72 NRC at 465–66.

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independent responsibility to assess whether a petitioner has established its standing to intervene. See 10 C.F.R. § 2.309(d)(2); see also Exelon Generation Co., LLC (Peach Bottom Atomic Power Station, Units 2 and 3), LBP-19-5, 89 NRC 483, 491 (2019), aff’d on other grounds, CLI-20-11, 92 NRC 335 (2020). It is not clear if the same precept applies in this proceeding to a Board determination about whether a potential party is likely to establish standing.

<sup>18</sup> In connection with the standing of potential parties Overall and Miller, based on the information supplied in the initial access request, they appear to reside within 20 miles of the NFS Erwin facility. See Initial SUNSI Access Request at 2. Should either Ms. Overall, Ms. Miller, or both decide to submit an intervention petition regarding the pending NFS license amendment application, under agency caselaw the degree to which their residence and other activities in the vicinity of the NFS facility will be sufficient to establish their standing will depend on whether they are able to show specific impacts to them from the activity proposed in the license amendment application at issue. See Nuclear Fuel Servs., Inc. (Erwin, Tennessee), LBP-04-5, 59 NRC 186,189–98 (concluding that while sufficiently particularized showings about impacts of proposed licensing action had not been made to establish standing of petitioners residing at between 2 and 20 miles from the NFS facility, adequate showing was made establishing standing for an individual who resided 1 mile from the facility and drove directly by the facility 5 days a week), aff’d, CLI-04-13, 59 NRC 244 (2004).

<sup>19</sup> S. Tex. Project Nuclear Operating Co. (South Texas Project, Units 3 and 4), CLI-10-24, 72 NRC 451, 465 (2010) (footnotes omitted).

Ms. Overall has taken two different approaches in trying to show that providing her with access to SUNSI material would be appropriate under this standard. In the first instance, as embodied in her initial SUNSI access request, indicating that she would “require all of the SUNSI involved with this action at NFS,” she further explained that this information was needed because “the NRC has the Ketterer Report which ECAN commissioned. . . . We did not get this study from the [Department of Energy] or the NRC. We did it. Therefore, I would be very interested in what the NRC is willing to share with me.” Initial SUNSI Access Request at 2, 3. Further, she stated that she is making her SUNSI access request because

[t]he NRC pulled out of the study by the [NAS], which, Ms. Linda Modica, had so graciously gotten for the people here. We were one of the chosen facilities. Only 5 were chosen. Germany and France have studies around nuclear facilities that match ours. We find it disturbing no such studies have been done in this country to my knowledge. None. Except for ours. The Ketterer Report. And The Cancer Study by ECAN which the ladies commissioned. Therefore, I would be very interested in seeing the SUNSI documents so as to help me understand the real purpose and function of the NRC. We were under the impression it was to protect the Public Health and Safety.

Id. at 3.

As a basis for seeking SUNSI materials associated with the NFS license amendment application, this approach has two significant deficiencies. First, as the NRC Staff points out, Ms. Overall’s concerns relate to past agency action, with which she seemingly disagrees, in connection with studies of radiation levels around the NFS facility, rather than asserting the SUNSI materials are necessary for her to plead material elements of her opposition to the matter to which those SUNSI documents correlate, i.e., the pending NFS amendment application.<sup>20</sup> See Staff SUNSI Access Request Denial at 2. This misplaced focus does nothing

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<sup>20</sup> Ms. Overall references the November 2010 Ketterer report prepared by University of Northern Arizona professor Michael E. Ketterer, which provides an analysis of the results of isotopic studies in the vicinity of the NFS facility in an effort to evaluate the extent of offsite dispersion of uranium and related contaminants. See Michael E. Ketterer, Interim Report: Results of Isotopic Studies of Uranium in Environmental Samples from the Vicinity of the [NFS]

to establish the requisite “need” for the SUNSI materials at issue. Like a contention submitted in support of a hearing request,<sup>21</sup> a request for access to SUNSI material must describe those

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Facility, Erwin, TN at 1 (Nov. 11, 2010), <https://www.nrc.gov/reading-rm/doc-collections/commission/slides/2011/20110527/ketterer-ureport-20110527.pdf>.

This report, along with a slide presentation prepared by the Northeast Tennessee Regional Health Office providing 1990-2006 cancer incidence and mortality data in Unicoi County, Tennessee, where the NFS facility is located, were presented by Linda Modica to the Commission for its consideration in the context of a May 2011 briefing on the results of the NRC Staff’s Agency Action Review Meeting (AARM), which is intended to review and coordinate agency actions regarding reactor and materials licensees. See Commission Meeting: Briefing on the Results of the [AARM], <https://www.nrc.gov/reading-rm/doc-collections/commission/slides/2011/20110527/index.html>; see also (E-Mail from Linda Cataldo Modica, Chair, Fuel Facilities Working Group, Sierra Club, to Annette L. Vietti-Cook, Secretary of the Commission, NRC (May 25, 2011, 2:44 a.m. EDT), <https://www.nrc.gov/reading-rm/doc-collections/commission/slides/2011/20110527/linda-email-20110527.pdf>; La’Shan D. Taylor, Unicoi County Cancer Information (undated), <https://www.nrc.gov/reading-rm/doc-collections/commission/slides/2011/20110527/unicoi-cc-info-20110527.pdf>.

Also associated with past agency activities is the NAS pilot study referred to by Ms. Overall, which purportedly was to assess cancer risks in populations near United States nuclear facilities, including the NFS facility, and was discontinued by the agency in 2015 based on a determination “that continuing the work was impractical, given the significant amount of time and resources needed and the agency’s current budget constraints.” Press Release, Off. of Pub. Affairs, NRC, NRC Ends Work on [NAS] Cancer Risk Pilot Study (Sept. 8, 2015) (ADAMS Accession No. ML15251A111).

Another document attached to Ms. Overall’s initial SUNSI access request is the May 2008 U.S. Department of Health and Human Services (HHS) Agency for Toxic Substances and Disease Registry (ATSDR), which she explained “says there could be a pathway to humans.” Initial SUNSI Access Request at 4; see id. attach. (Public Health Service, HHS, Public Health Assessment for [NFS], Erwin, Unicoi County, Tennessee, EPA Facility ID: TND003095635 (May 29, 2007)) [hereinafter ATSDR]. This study was referenced previously in an August 7, 2008 ECAN letter to the Commission as support for ECAN’s assertion that additional NRC scrutiny and action concerning NFS facility operations was required. See [Executive Director for Operations (EDO)] Principal Correspondence Control Cover Sheet, EDO Control: G20080570, unnumbered attach. 4, at 1 (Aug. 26, 2008) (Letter from Members of ECAN to Gregory Jaczko, Chairman, NRC (Aug. 7, 2008)) (ADAMS Accession No. ML082400107). While the ATSDR report noted that under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675, ATSDR activities were statutorily precluded from evaluating radioactive materials released from the NFS site, the study did consider non-radioactive contaminants and concluded that “although some exposure might be occurring as a result of site conditions via the atmospheric exposure pathways, exposures are not at levels likely to cause adverse health.” ATSDR at 25.

<sup>21</sup> As the Commission has observed, the showing of “need” to gain access to SUNSI material is not to be “conflated with the [10 C.F.R. § 2.309(f)] contention admissibility standards.” See South Texas, CLI-10-24, 72 NRC at 467. Nonetheless, as is the case with the SUNSI access “need” showing, the section 2.309(f) criteria governing the admissibility of any contention filed in support of a hearing petition call for a focus on the license application

aspects of the proposed license application (or any associated NRC requirements or guidance) to which the SUNSI material bears a relationship and must further explain how providing such material will assist a potential party in challenging that license application. Additionally, Ms. Overall's emphasis on purported agency action (or inaction) runs counter to the well-recognized tenet that in a licensing proceeding, the applicant's license application, not the adequacy of the agency's actions, is the focus of the proceeding.<sup>22</sup> As is the case with a proffered contention, a SUNSI access request is not an appropriate vehicle for questioning the NRC Staff's past regulatory efforts nor is it an opportunity to raise generic grievances about how the licensee has historically operated under its NRC license.<sup>23</sup>

Ms. Overall's second line of argument is framed in her appeal from the NRC Staff's denial of her SUNSI access request and invokes what she maintains is her basic inability to address the Commission-established "need" requirement. She asserts that because the NFS SUNSI materials relevant to the license amendment process have been withheld from public view, she cannot know what is in the NFS SUNSI documents to begin with. She thus contends as follows:

NRC's reasoning is circular. The Federal Register announcement shows that four of the five SUNSI documents were submitted by NFS as attachments to its application. They have not been rejected or excluded by NRC. The fifth SUNSI document

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at issue. See 10 C.F.R. § 2.309(f)(1)(vi) (directing that in providing sufficient information to establish that a genuine dispute exists with the applicant/licensee on a material issue of law or fact, a hearing petition contention must (1) reference specific portions of the application that the petitioner disputes and supporting reasons for each dispute; or (2) identify failures in the application to contain information on a relevant matter as required by law); see also Susquehanna, CLI-17-4, 85 NRC at 74 (identifying deficiencies in contention pleading to include failure to identify a specific portion of the application disputed).

<sup>22</sup> See Pac. Gas & Elect. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 807 (indicating that in a licensing proceeding, with the exception of certain NEPA issues, the applicant's license application is in issue, not the adequacy of the NRC Staff's review of the application), review denied, CLI-83-32, 18 NRC 1309 (1983).

<sup>23</sup> Instead, questions about the appropriateness of a licensee's past (or current) operational activities are more appropriately interposed in the context of 10 C.F.R. § 2.206 petition requesting that the NRC Staff take some type of regulatory action (including modifying, suspending, or revoking the license) with respect to such licensee activities.

was supplied to NRC at NRC's request. By definition, therefore, these documents relate to the license application or to NRC requirements or guidance. In response to the criterion that I must show "how it will assist the requester in seeking intervention," I can only pose the question: How can I possibly demonstrate that without seeing the documents themselves? As to the remaining requirement, to explain why existing publicly available versions of the application would not be sufficient, I again note that apparently the publicly available versions are not regarded by NFS or NRC as being sufficient for their purposes; therefore, the publicly available versions could not be sufficient for me to be able to participate meaningfully in this proceeding. In summary, NRC wants to keep me in the dark about basic information that NRC itself is considering.

SUNSI Access Denial Appeal at PDF 1-2.

The problem with this argument is that it essentially negates the role assigned to a presiding officer in assessing a SUNSI access request, which is to "balance the applicant's interest in protecting [SUNSI] information with the petitioner's legitimate interest in obtaining information that is necessary to allow for meaningful participation in the adjudicatory proceeding," Susquehanna, CLI-17-4, 85 NRC at 67, in favor of a potential party. As the "need" criterion has been articulated by the Commission, it cannot be the case that simply pleading "I don't know what's there until I see it" is enough to gain access to the SUNSI material. Rather, as the Commission has made clear,

[w]hile this is not a demanding standard, it does require a potential party to be familiar with the application, to articulate concerns that directly relate to the application, and to explain why having access to the information redacted from the application is necessary to either formulate or buttress a contention (or otherwise determine that a contention is unwarranted).

Id.

Consequently, the Commission's SUNSI access criteria for materials associated with a license application obligates a potential party, including a self-represented litigant such as Ms. Overall,<sup>24</sup> to (1) review the information to which the potential party did have access, including

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<sup>24</sup> In her initial SUNSI access request, Ms. Overall stated that "I am also inquiring as to how my environmental attorney, David Bullock, can legally access redacted material re: this

the redacted supplemental environmental report; and (2) reference specific information from the license amendment's publicly available documents in articulating their concerns directly relating to the application and explaining what nonpublic material they need to assist in formulating, for a hearing request, sufficiently detailed contentions regarding those concerns. This is an endeavor Ms. Overall had to undertake to provide a sufficient showing that she did indeed have the requisite "need" for the SUNSI material associated with the NFS amendment application.<sup>25</sup> In this instance, however, based on what Ms. Overall presented both in her initial access request to the NRC Staff and in her access denial appeal before this Board, she has failed to make the requisite showing.<sup>26</sup>

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action?" Initial SUNSI Access Request at 1. While this might indicate that if a hearing petition challenge to the NFS license amendment application is filed, Ms. Overall (or an organization seeking to intervene as representing her interests) will have counsel, for the purpose of Ms. Overall's SUNSI access request and her subsequent access denial appeal, we consider her to be a self-represented/pro se litigant. As such, under long-established Commission practice, in assessing her submissions, she is entitled to some leniency in pleading. See Susquehanna, LBP-16-12, 84 NRC at 160 (citing Entergy Nuclear Vt. Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 45 n.246 (2010)). Such leniency does not, however, provide a licensing board with the latitude to grant SUNSI access based on pleadings that are facially deficient, as is the case in this instance.

<sup>25</sup> See S. Tex. Project Nuclear Operating Co. (South Texas Project, Units 3 and 4), LBP-09-5, 69 NRC 303, 313 (2009) (observing that difficulty in making requisite "need" showing because of lack of access to SUNSI information does not absolve requestor of at least endeavoring to address the "need" criterion since contrary conclusion would improperly convert SUNSI disclosure process into procedure in which broad, nonspecific, and speculative assertions of "need" would mandate wholesale SUNSI release).

<sup>26</sup> We note as well that on October 5, 2022, Ms. Overall submitted a response to the Staff's October 3 reply to her SUNSI access denial appeal, stating that because the SUNSI material was submitted by NFS to support its amendment application and apparently was accepted by the NRC as suitable for that purpose, she likewise needs to review the SUNSI material, along with the publicly available information regarding the NFS application, to determine on what basis to challenge the application. See Letter from Park Overall to E. Roy Hawken, Chief Administrative Judge at 1 (Oct. 5, 2022) [hereinafter Overall Response Letter]. Although we observed in a memorandum and order issued that same date that, absent a motion for leave to file, Ms. Overall's additional pleading was not contemplated by the procedures governing a SUNSI access request, see Licensing Board Memorandum and Order (Regarding Additional Filing by Park Overall) (Oct. 5, 2022) at 1–2 (unpublished), relative to the substance of her argument, for the same reasons stated above, we find it fails to establish the requisite "need" for the SUNSI materials at issue.

### III. CONCLUSION

Although Ms. Overall obviously has strong reservations about the operation of the NFS facility generally, that is not grounds for obtaining the SUNSI documents NFS submitted in support of its November 2021 license amendment application associated with the U-Metal Project. Accordingly, for the reasons set forth in section II above, we conclude that Ms. Overall

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We also find misplaced her defense in that letter of the timeliness of her September 28 SUNSI access appeal from the NRC Staff's September 21 access denial. See Overall Response Letter at 1. Ms. Overall's response apparently was triggered by a Staff reference in its October 3 reply to her SUNSI access appeal about the purported untimeliness of that filing. See Staff SUNSI Access Appeal Denial Reply at PDF 2 n.8. In her letter, Ms. Overall acknowledges that the Commission-directed schedule governing filings in this SUNSI access proceeding indicated she had five days to submit her appeal following the Staff's issuance of its denial. See Overall Response Letter at 1. Nonetheless, highlighting that two of those days were during a weekend, she asserted that "[n]ormal procedures in case of such short deadlines call for the exclusion of weekend days and holidays," such that her appeal was not due on September 26, 2022, but instead two days later. Id.

Some federal agencies do not include weekends and holidays in computing the filing date for pleadings due within a relatively short time. See 47 C.F.R. § 1.4(g) (indicating that in determining due date for Federal Communications Commission filings, weekends and holidays are not counted if the filing period is fewer than seven days). NRC's rules of practice contain no such exclusion, however. See 10 id. § 2.306(b) (outlining exceptions that add time to a prescribed filing period, which do not include a short filing period).

For its part, the Staff did not claim the apparent untimeliness of her SUNSI access appeal was a basis for denying her appeal, see Staff SUNSI Access Appeal Denial Reply at PDF 1 n.3, and we likewise do not rely on that purported deficiency as grounds for rejecting her appeal. Nevertheless, if a participant in an NRC adjudicatory proceeding wants additional time to make a filing beyond what is prescribed by rule or order, that participant should submit a motion for an extension of time to the applicable presiding officer. See 10 C.F.R. § 2.307(a).

has failed to articulate the requisite “need” for access to this SUNSI material, and so we uphold the NRC Staff’s determination denying her SUNSI access request.

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For the foregoing reasons, it is this nineteenth day of October 2022, ORDERED, that:

1. Relative to the September 28, 2022 appeal of Park Overall requesting reversal of the NRC Staff’s September 21, 2022 rejection of her September 12, 2022 SUNSI access request, the NRC Staff’s denial of Ms. Overall’s SUNSI access request is affirmed.

2. Pursuant to 10 C.F.R. § 2.311(a)(3), (b), any appeal to the Commission from this memorandum and order must be filed within twenty-five (25) days after service of this issuance.

THE ATOMIC SAFETY  
AND LICENSING BOARD

*/RA/*

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G. Paul Bollwerk, III, Chair  
ADMINISTRATIVE JUDGE

*/RA/*

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William J. Froehlich  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Sue H. Abreu  
ADMINISTRATIVE JUDGE

Rockville, Maryland

October 19, 2022

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
 )  
Nuclear Fuel Services, Inc. ) Docket No. 70-143-LA  
 )  
(Application to Amend Special Nuclear )  
Materials License SNM-124) )  
 )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Ruling on Appeal from NRC Staff's Denial of Request for Access to Nonpublic Information) (LBP-22-02)** have been served upon the following persons by Electronic Information Exchange and by electronic mail as indicated by an asterisk.

U.S. Nuclear Regulatory Commission  
Office of Commission Appellate Adjudication  
Mail Stop: O-16B33  
Washington, DC 20555-0001  
E-mail: [oca@mail.resource@nrc.gov](mailto:oca@mail.resource@nrc.gov)

U.S. Nuclear Regulatory Commission  
Office of the Secretary of the Commission  
Mail Stop: O-16B33  
Washington, DC 20555-0001  
E-mail: [hearingdocket@nrc.gov](mailto:hearingdocket@nrc.gov)

U.S. Nuclear Regulatory Commission  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3F23  
Washington, DC 20555-0001  
Roy Hawkens, Chief Administrative Judge  
Dr. Sue H. Abreu, Associate Chief  
Administrative Judge (Technical)  
G. Paul Bollwerk, Administrative Judge  
William J. Froehlich, Administrative Judge  
Allison R. Wood, Law Clerk  
E-mail: [roy.hawkens@nrc.gov](mailto:roy.hawkens@nrc.gov)  
[sue.abreu@nrc.gov](mailto:sue.abreu@nrc.gov)  
[paul.bollwerk@nrc.gov](mailto:paul.bollwerk@nrc.gov)  
[william.froehlich@nrc.gov](mailto:william.froehlich@nrc.gov)  
[allison.wood@nrc.gov](mailto:allison.wood@nrc.gov)

U.S. Nuclear Regulatory Commission  
Office of the General Counsel  
Mail Stop - O-14A44  
Washington, DC 20555-0001  
Mauri T. Lemoncelli  
Joseph D. McManus  
Nicolas P. Mertz  
Kevin C. Roach  
E-mail: [Mauri.Lemoncelli@nrc.gov](mailto:Mauri.Lemoncelli@nrc.gov)  
[Joseph.McManus@nrc.gov](mailto:Joseph.McManus@nrc.gov)  
[Nicolas.Mertz@nrc.gov](mailto:Nicolas.Mertz@nrc.gov)  
[Kevin.Roach@nrc.gov](mailto:Kevin.Roach@nrc.gov)

Nuclear Fuel Services, Inc.  
1205 Banner Hill Road  
Erwin, TN 37650  
Timothy A. Knowles  
Director, Safety and Safeguards  
E-mail: [tknowles@nuclearfuelservices.com](mailto:tknowles@nuclearfuelservices.com)

Counsel for Nuclear Fuel Services, Inc.  
Morgan, Lewis & Bockius, LLC  
1111 Pennsylvania Ave NW  
Washington, DC 20004  
Ryan K. Lighty  
E-mail: [ryan.lighty@morganlewis.com](mailto:ryan.lighty@morganlewis.com)

Nuclear Fuel Services 70-143-LA

**MEMORANDUM AND ORDER (Ruling on Appeal from NRC Staff's Denial of Request for Access to Nonpublic Information) (LBP-22-02)**

Erwin Citizens Awareness Network  
P.O. Box 1152  
Jonesborough, TN 37659  
Linda Cataldo Modica, President\*  
Barbara O'Neal, Vice President\*  
Trudy Wallack, Secretary\*  
E-mail: lcomodica@aol.com  
barboneal@charter.net  
trudyilmw@aol.com

Stakeholder  
Park Overall  
Olparko@aol.com

Dated at Rockville, Maryland,  
this 19<sup>th</sup> day of October 2022.

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Office of the Secretary of the Commission