

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

In the Matter of)

LUMINANT GENERATION COMPANY LLC)

(Comanche Peak Nuclear Power Plant, Units 3 and 4))

Docket Nos. 52-034-COL
52-035-COL

CLI-10-25

MEMORANDUM AND ORDER

Today we resolve an appeal and request for stay¹ of an Atomic Safety and Licensing Board decision regarding access to a non-public document that presents issues identical to those raised in the *South Texas* proceeding, which we resolved in CLI-10-24.² We reverse the Board's rulings with respect to access to the document and remand the issue to the Board for further proceedings consistent with CLI-10-24. We deny the Staff's stay application as moot.³

This proceeding concerns the combined license (COL) application filed by Luminant Generation Company LLC (Luminant), to construct and operate two new nuclear reactors at the

¹ *NRC Staff Notice of Appeal and Request for Stay of Sections IV and V.B of LBP-10-05, Order (Ruling on Intervenors' Access to ISG-016) (Mar. 22, 2010); NRC Staff Brief in Support of Appeal from LBP-10-05 and Request for Stay (Mar. 22, 2010) (Staff Appeal).*

² CLI-10-24, 72 NRC __ (Sept. 29, 2010) (slip op.).

³ See Order (Mar. 30, 2010) (unpublished) (issuance by the Secretary of a housekeeping stay, pending our resolution of the Staff's stay application) (Housekeeping Stay).

Comanche Peak site in Somervell County, Texas. In accordance with the notice of hearing issued for this proceeding,⁴ the Sustainable Energy and Economic Development (SEED) Coalition, Public Citizen, True Cost of Nukes, and Texas State Representative Lon Burnam (collectively, Intervenors) jointly petitioned to intervene.⁵ The Board granted Intervenors' petition, admitting them as parties to the proceeding.⁶

Appended to the notice of hearing was an order imposing procedures for potential parties⁷ to seek access to certain non-public information, including sensitive unclassified non-safeguards information (SUNSI), to support their initial petitions and requests for hearing.⁸ As in the *South Texas* case, after being admitted as parties to the proceeding, Intervenors requested, under the Access Order, DC/COL-ISG-016 (ISG-016),⁹ a draft interim staff guidance document that has been categorized as containing security-related SUNSI, and thus has been withheld from the public.

⁴ Luminant Generation Company LLC; Application for the Comanche Peak Nuclear Power Plant Units 3 and 4; Notice of Order, Hearing, and Opportunity To Petition for Leave To Intervene, 74 Fed. Reg. 6177 (Feb. 5, 2009).

⁵ *Petition for Intervention and Request for Hearing* (Apr. 6, 2009).

⁶ LBP-09-17, 70 NRC __ (Aug. 6, 2009) (slip op. at 84). This proceeding is being held under our rules set forth in 10 C.F.R. Part 2, subparts C and L. *Id.* at __ (slip op. at 85).

⁷ A "potential party" is defined in our rules as "any person who has requested, or who may intend to request, a hearing or petition to intervene in a hearing under 10 CFR part 2, other than hearings conducted under Subparts J and M of 10 CFR part 2." 10 C.F.R. § 2.4.

⁸ 74 Fed. Reg. at 6179 (Access Order).

⁹ DC/COL-ISG-016, [Draft] Interim Staff Guidance, Compliance with 10 CFR 50.54(hh)(2) and 10 CFR 52.80(d), Loss of Large Areas of the Plant due to Explosions or Fires from a Beyond-Design Basis Event (Oct. 7, 2009) (ML092100361) (non-public ADAMS). The guidance pertains to compliance with the Power Reactor Security Rule. See 10 C.F.R. §§ 50.54(hh)(2), 52.80(d). Intervenors' request followed the submission by Luminant of a supplement to the COL application required by that rule.

The Staff denied Intervenors' request for access to ISG-016,¹⁰ and Intervenors appealed the Staff's denial of access to the Board.¹¹ The Board sustained Intervenors' challenge to the denial of access, reaching a different result from the Staff regarding whether Intervenors had shown a "need" for ISG-016.¹² The Staff filed the instant appeal, which is opposed by Intervenors.¹³ On appeal, the Staff argues that the Board's ruling should be reversed because the Board "misconstrued the [Access Order] . . . and created an incorrect standard for 'need' determinations."¹⁴

We addressed the precise issue of access by a party to draft ISG-016 in the *South Texas* COL proceeding. The procedural posture of the two cases is identical – there, as here, the intervenors in *South Texas* had been admitted as parties at the time of their request for SUNSI, raising the question of the Access Order's applicability.

¹⁰ Letter from Susan H. Vrahoretis, counsel for NRC Staff, to Robert Eye, counsel for Intervenors (Nov. 16, 2009) at 1 (Staff Denial Letter).

¹¹ Letter from Robert V. Eye, counsel for Intervenors, to Administrative Judges Young and Gibson (Nov. 20, 2009) at 1 (appealing the Staff's denial of access to both the *South Texas* and *Comanche Peak* Boards). Intervenors cite the Access Order as authority for their appeal. *Id.* (citing 74 Fed. Reg. at 6180).

¹² LBP-10-5, 71 NRC __ (Mar. 11, 2010) (slip op. at 18). Before the Board's decision in LBP-10-5, Intervenors filed a Freedom of Information Act (FOIA) request for ISG-016, among other documents. See Letter from SEED Coalition to FOIA/Privacy Officer, U.S. NRC (Feb. 26, 2010) at 1 (ML100910567). The Staff responded to Intervenors' FOIA request, and provided a redacted version of ISG-016. See FOIA/PA-2010-0145 – Resp 2 Partial, DC/COL-ISG-016, Interim Staff Guidance, Compliance with 10 CFR 50.54(hh)(2) and 10 CFR 52.80(d) Loss of Large Areas of the Plant due to Explosions or Fires from a Beyond-Design Basis Event (June 24, 2010) (ML101760169) (ADAMS package).

¹³ *Intervenors' Response Brief in Opposition to Staff's Appeal of LBP-10-05, Sections IV and V.B.* (Apr. 1, 2010).

¹⁴ Staff Appeal at 1-2.

As we explained in *South Texas*,¹⁵ the Access Order does not apply in the circumstances presented here. Once a petition to intervene has been granted, issues involving access to documents for use in the proceeding are governed by our discovery rules. In a Subpart L proceeding such as this, we look to the mandatory disclosure provisions of 10 C.F.R. § 2.336.¹⁶ In this case, we are presented with a discovery dispute that involves the Staff's disclosure obligations. Intervenors have requested a draft staff guidance document that, in final form, is intended for use in the Staff's evaluation of the COL application's compliance with our rules. To the extent the Staff intends to use ISG-016 in its evaluation of Luminant's COL application, ISG-016 would be appropriately identified as part of the Staff's mandatory disclosures.¹⁷

However, as was also the case in *South Texas*, the circumstances in this proceeding appear to present an obstacle for Intervenors that ordinarily might not be present under our rules. Here, in addition to the requirements of section 2.336, the Board's initial scheduling order further defines the scope of the parties' mandatory disclosures according to an agreement reached by the parties, and approved by the Board, not to produce or identify draft versions of documents.¹⁸ As indicated above, Intervenors have requested a *draft* version of ISG-016. It

¹⁵ CLI-10-24, 72 NRC __ (slip op. at 16).

¹⁶ See 10 C.F.R. §§ 2.336(g), 2.1203(d). See *generally* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2225 (Jan. 14, 2004) ("The discovery required by § 2.336 constitutes the totality of the discovery that may be obtained in informal proceedings.").

¹⁷ See 10 C.F.R. § 2.336(b)(3) (requiring that the Staff disclose, among other things, "[a]ll documents . . . supporting the NRC staff's review of the application or proposed action that is the subject of the proceeding").

¹⁸ Initial Scheduling Order (Oct. 28, 2009) at 4 (unpublished) ("Except as otherwise stated herein or in subsequent orders, the Board accepts and adopts the Agreement of the Parties Regarding (continued. . .)").

appears that, but for the status of the document as a draft, Intervenor would be able to seek access to it through normal discovery channels.¹⁹ Because the parties have not briefed this issue, we remand the discovery dispute concerning access to draft ISG-016 to the Board for further proceedings consistent with the framework set forth in CLI-10-24.²⁰

For the reasons set forth above, we *reverse* the Board's ruling regarding access to draft ISG-016, and *remand* the question of access to the document to the Board for further proceedings in accordance with CLI-10-24.²¹ We *deny* the Staff's stay application as moot.²²

(. . .continued)

Mandatory Discovery Disclosures, submitted on August 13, 2009.”). See also Letter from Steven P. Frantz, counsel for Luminant, to Licensing Board (Aug. 13, 2009) ¶ 1.

¹⁹ See *generally* Initial Scheduling Order at 4-5 (setting forth the terms for disclosure disputes and motions to compel).

²⁰ The final version of ISG-016 has now been issued. See DC/COL-ISG-016, [Final] Interim Staff Guidance, Compliance with 10 CFR 50.54(hh)(2) and 10 CFR 52.80(d) Loss of Large Areas of the Plant due to Explosions or Fires from a Beyond-Design Basis Event (June 9, 2010) (ML100431200) (non-public ADAMS). Assuming that the Staff plans to use ISG-016 in evaluating Luminant's COL application, we expect the Staff to identify the final version in its next mandatory disclosure update in accordance with 10 C.F.R. § 2.336(b)(3) and (d), and the Board's Initial Scheduling Order. (The Staff did not identify the document in its June 15, 2010, July 15, 2010, August 16, 2010, or September 15, 2010 updates.) Should the Staff seek to withhold the document under a claim of privilege or protected status, we expect the document to be identified as required under section 2.336(b)(5). Intervenor then may seek to obtain the document in accordance with the procedures set forth in the Board's Initial Scheduling Order. See Initial Scheduling Order at 4-5. On remand, the Board may want to explore with the parties whether Intervenor wish to continue their pursuit of the draft version considering that the guidance has now issued in final form.

²¹ In view of our decision, we need not address the Staff's argument that the Board has misconstrued the Access Order's "need for SUNSI" standard. We direct the parties' attention to the guidance that we provided on this issue in CLI-10-24. See 72 NRC ___ (slip op. at 20-25).

²² With the issuance of this Memorandum and Order, the housekeeping stay expires automatically. See Housekeeping Stay at 2.

IT IS SO ORDERED.²³

For the Commission

[SEAL]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

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

²³ Commissioner Magwood did not participate in this matter.