UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

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

**CLI-10-24**

**MEMORANDUM AND ORDER**

Today we address several matters associated with our procedures governing access by potential parties to sensitive unclassified non-safeguards information (SUNSI) in adjudicatory proceedings. Earlier this year, the Atomic Safety and Licensing Board issued an order that, among other things, addressed Intervenors'[1] request for access to a SUNSI document that the Staff previously had denied. On this issue, the Board directed the Staff to redact the non-public portions of the document and provide the redacted version to Intervenors, and to reassess its

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

denial of access to the document as a whole.[2] The Staff has appealed these rulings.[3] In addition, the Staff has requested a stay of the effectiveness of the Board's order pending resolution of its appeal. For the reasons set forth below, we reverse the Board's rulings with respect to release of the document, and remand the issue to the Board for further proceedings consistent with this Memorandum and Order. In addition, we deny the Staff's stay application, which had been held in abeyance by the Secretary's issuance of a housekeeping stay,[4] as moot.[5] Finally, we provide general guidance on how to address the "need" for SUNSI in future adjudications.

## I. BACKGROUND

Given that this is the first appeal to arise under our SUNSI Policy, we begin with a brief discussion of the agency's general practices regarding the handling of sensitive information that, while not designated classified or Safeguards Information, nonetheless merits a level of additional protection. A short statement of the case follows.

### A. NRC SUNSI Policy

After the events of September 11, 2001, the NRC undertook an evaluation of the types of information that it releases to the public out of concern that certain information might be used

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[2] LBP-10-2, 71 NRC __ (Jan. 29, 2010, as re-issued on Feb. 16, 2010) (slip op. at 19).

[3] *NRC Staff Notice of Appeal and Request for Stay of LBP-10-02, Order (Rulings on the Admissibility of New Contentions and on Intervenors' Challenge to Staff Denial of Documentary Access)* (Feb. 9, 2010); *NRC Staff Brief in Support of Appeal of LBP-10-02* (Feb. 9, 2010) (Staff Appeal).

[4] *See* Order (Feb. 17, 2010) (unpublished) (Housekeeping Stay).

[5] Intervenors' appeal of the Board's ruling regarding the admissibility of three contentions challenging STPNOC's Mitigative Strategies Report is addressed in a separate memorandum and order. *See* CLI-10-16, 71 NRC __ (June 17, 2010) (slip op.).

by terrorists in planning and executing an attack.[6] At our direction, the Staff developed guidance regarding the withholding of certain categories of sensitive information. At bottom, it was our goal for the guidance to reflect the balance between fostering meaningful participation by providing the public with access to information on the one hand, and, on the other, preventing potential adversaries from using the information to do harm.[7] Out of this process, the concept of "SUNSI" was formed. The term describes information that already was withheld from the public prior to September 11, 2001 – i.e., information withheld for reasons of security, personal privacy, and commercial or trade secrets – as well as additional information for which it was determined there was a risk of use by potential adversaries to plan or execute an attack.[8]

As defined in the current interim "NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information," "'SUNSI' means any information of which the loss, misuse, modification, or unauthorized access can reasonably be foreseen to harm the public interest, the commercial or financial interests of the entity or individual to whom the information pertains, the conduct of NRC and Federal programs, or the personal privacy of individuals."[9] Seven categories of information comprise "SUNSI": (1) allegation information; (2)

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[6] *See* SECY-04-0191, Withholding Sensitive Unclassified Information Concerning Nuclear Power Reactors from Public Disclosure (Oct. 19, 2004) at 2 (ML042310663) (SECY-04-0191). *See also* SECY-05-0091, Task Force Report on Public Disclosure of Security-Related Information (May 18, 2005) at 1 (ML051400108) (Task Force Report on Public Disclosure).

[7] *See* SECY-04-0191, at 2.

[8] *See, e.g.*, *id.* at 2-4. "SUNSI" does not encompass classified or Safeguards Information.

[9] COMSECY-05-0054, Policy Revision: Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information (SUNSI), Attachment 2 (Oct. 26, 2005) at 1 (ML052520181) (SUNSI Policy). We disapproved the Staff's revised SUNSI policy set forth in COMSECY-05-0054. In so doing, we instructed the Staff to "develop a simplified policy, including a two-tiered handling regime, that incorporates the seven existing SUNSI categories (continued. . .)

investigation information; (3) security-related information; (4) proprietary information; (5) Privacy Act information; (6) federal-, state-, foreign government-, and international agency-controlled information; and (7) sensitive internal information.[10] The SUNSI Policy does not change any of the statutory, regulatory, or other obligations of the agency with respect to the handling of information. To the contrary, the policy expressly incorporates existing requirements to the extent they apply to any of the seven SUNSI categories.[11]

A separate matter from the categorization of SUNSI is access to SUNSI. As relevant here, issues involving access to SUNSI might arise in connection with our adjudicatory proceedings, when potential parties[12] or parties seek to obtain this information to assist them in litigating their claims. With respect to access sought by potential parties, in mid-2007 the Staff developed and solicited public comment on a proposed rule, and a related document

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(. . .continued)

and incorporate performance based, common sense approaches when possible, subject to the specific directions contained in this SRM." Staff Requirements – COMSECY-05-0054 – Policy Revision: Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information (SUNSI) (June 29, 2006) at 1 (ML061800218). Among other things, we observed that any SUNSI policy that we ultimately approved could change upon the Executive Branch standardizing a government-wide policy on the handling of sensitive information. *Id.* at 1. However, we stated that the Staff should "continue to use the SUNSI policy it has in place" until it develops the simplified policy or until a standardized federal government policy is instituted. *Id.* Therefore, the policy outlined in COMSECY-05-0054 reflects the agency's current interim SUNSI policy.

[10] SUNSI Policy at 1.

[11] *Id.* For example, the Privacy Act of 1974, as amended, governs the handling of Privacy Act information. *Id.* As another example, 10 C.F.R. § 2.390 governs the handling of confidential commercial or financial (proprietary) information that has been submitted to the agency. *Id.* *See generally* 10 C.F.R. § 2.390.

[12] 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.

incorporating a set of procedures designed to facilitate access to information categorized as SUNSI (and Safeguards Information) that potential parties might need in order to meet the requirements to intervene in an adjudicatory proceeding.[13] In accordance with these procedures, a potential party seeking access to SUNSI may submit a request to the Staff within ten days after publication of a notice of hearing or notice of opportunity to request a hearing in a licensing proceeding.[14] Within ten days of receipt of the request, the Staff then will determine if the request demonstrates a likelihood of establishing standing and a need for SUNSI.[15] If the request for SUNSI is granted, the terms and conditions for access will be set forth in a proposed protective order and non-disclosure agreement.[16] The procedures also provide an avenue for appeals of Staff access determinations to a presiding officer – either the Board established to preside over the proceeding; or if one has not been established, the Chief Administrative Judge; or a Board established to rule on information access issues.[17] These procedures were finalized

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[13] *See* Proposed Rule, Interlocutory Review of Rulings on Requests by Potential Parties for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information, 72 Fed. Reg. 32,018, 32,018 (June 11, 2007) (comment period reopened and proposed procedures issued for comment in 72 Fed. Reg. 43,569 (Aug. 6, 2007)); Availability for Comment of Proposed Procedures to Allow Potential Intervenors to Gain Access to Relevant Records that Contain Sensitive Unclassified Non-Safeguards Information or Safeguards Information (July 31, 2007) (ML071910149) (Proposed Access Procedures).

[14] *See* Procedures to Allow Potential Intervenors to Gain Access to Relevant Records that Contain Sensitive Unclassified Non-Safeguards Information or Safeguards Information, Attachment 1 (Feb. 29, 2009) at 1 (ML080380626) (Access Procedures).

[15] *Id.* at 5.

[16] *Id.* at 7.

[17] *Id.* at 8. Either the requester may appeal an adverse access determination, or a party other than the requester may challenge a Staff determination granting access to SUNSI that would harm that party's interest independent of the proceeding. *Id.*

in early 2008.[18] At that time we also amended sections 2.307 and 2.311 of our regulations, respectively, to: (1) delegate authority to the Secretary of the Commission to issue orders imposing the access procedures in connection with a notice of hearing or notice of opportunity to request a hearing in a licensing proceeding; and (2) establish a mechanism for appeals of presiding officer or licensing board access determinations.[19]

B. The *South Texas* Proceeding

The issue before us pertains to access to SUNSI, and arises in connection with the combined license (COL) application of South Texas Project Nuclear Operating Company (STPNOC) to construct and operate two new units on its South Texas site, located in Matagorda County, Texas. Early last year, a notice of hearing and opportunity to petition for leave to intervene on STPNOC's COL application was published in the *Federal Register*.[20] Appended to the notice was an order imposing procedures for potential parties to seek access to certain non-public information, including SUNSI, to support their initial petitions and requests for hearing.[21] The Access Order requires a potential party requesting access to SUNSI to demonstrate:

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[18] *Id.* at 1.

[19] *See* Final Rule, Delegated Authority to Order Use of Procedures for Access to Certain Sensitive Unclassified Information, 73 Fed. Reg. 10,978 (Feb. 29, 2008); Final Rule, Interlocutory Review of Rulings on Requests by Potential Parties for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information, 73 Fed. Reg. 12,627 (Mar. 10, 2008).

[20] South Texas Project Nuclear Operating Company Application for the South Texas Project Units 3 and 4; Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 74 Fed. Reg. 7934 (Feb. 20, 2009).

[21] 74 Fed. Reg. at 7936. We refer to that order here as the "Access Order."

(1) that the potential party is likely to establish standing or otherwise participate as a party in the proceeding; and (2) that the proposed recipient has a need for SUNSI.[22]

The SEED Coalition, the South Texas Association for Responsible Energy, and Public Citizen filed a timely joint petition to intervene and request for hearing on STPNOC's COL application, proffering twenty-eight contentions.[23] Shortly after briefing on the intervention petition was complete, but before the Board ruled on the petition, STPNOC notified the Board that it had submitted to the Staff, as a supplement to the COL application, a "Mitigative Strategies Report" containing a description and plan for implementation of mitigative strategies dealing with explosions and fire in accordance with newly-promulgated sections 50.54(hh)(2) and 52.80(d) of the newly-promulgated Power Reactor Security Rule.[24] STPNOC explained that it had prepared the report using NEI-06-12,[25] a non-public guidance document.[26]

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[22] *Id.* at 7936-37.

[23] *Petition for Intervention and Request for Hearing* (Apr. 21, 2009).

[24] Letter from Steven P. Frantz, counsel for STPNOC, to Licensing Board (May 27, 2009) at 1 (ADAMS accession no. ML091470724). *See also* Letter from Scott Head, Manager, Regulatory Affairs, STPNOC, to U.S. NRC (May 26, 2009) at 1 (ML091470723) (stating that the Mitigative Strategies Report will be incorporated into the COL application as Part 11) (Mitigative Strategies Report Cover Letter). One contention in the initial petition asserted that the application was deficient and incomplete for failing to include the information required by sections 50.54(hh)(2) and 52.80(d) of the newly-promulgated rule. The Board found that this contention was inadmissible on the grounds that it became moot with STPNOC's submission of the Mitigative Strategies Report. *See* LBP-09-21, 70 NRC __ (Aug. 27, 2009) (slip op. at 11).

[25] NEI-06-12, B.5.b Phase 2 & 3 Submittal Guideline, Rev. 2 (Dec. 2006) (ML070090060) (non-public ADAMS).

[26] Mitigative Strategies Report Cover Letter at 1.

When STPNOC submitted the Mitigative Strategies Report to the Staff, it requested that the report be withheld from public disclosure because it contained security-related information;[27] the Staff has not publicly released the report. Responding to a joint motion filed by STPNOC, the Staff, and the SEED Coalition,[28] the Board issued a protective order governing "access to and use of protected information in the correspondence from [STPNOC] to the NRC Staff dated May 26, 2009 regarding the requirements under 10 C.F.R. § 52.80(d) and 10 C.F.R. § 50.54(hh)(2) and any related documents."[29] The Board also directed that persons receiving access to the protected information sign non-disclosure agreements.[30] Shortly thereafter, in accordance with the terms of the Protective Order, Intervenors submitted seven new contentions challenging the completeness of the information contained in the Mitigative Strategies Report.[31]

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[27] *Id. See also* 10 C.F.R. § 2.390(b), (d).

[28] *Joint Motion for Entry of a Protective Order* (June 26, 2009) (Joint Motion for Protective Order).

[29] Licensing Board Memorandum and Order (Protective Order Governing the Disclosure of Protected Information) (July 1, 2009) at 1 (unpublished) (Protective Order); Licensing Board Order (Amending Protective Order) (July 14, 2009) (unpublished).

[30] Protective Order at 1-2.

[31] *Intervenors 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) (ML092260793) (non-public ADAMS).

The Board issued the first of two rulings on the initial petition in August, finding that all three of the potential parties had demonstrated standing and had proffered at least one admissible contention.[32] Accordingly, all three were admitted as parties to the proceeding.[33]

In October, subsequent to the submission of the new contentions challenging the Mitigative Strategies Report, the NRC Staff posted a notice on the agency website informing the public that the Staff had issued a draft interim staff guidance document, DC/COL-ISG-016 (ISG-016),[34] to assist COL applicants and licensees in complying with sections 50.54(hh)(2) and 52.80(d).[35] In particular, the notice explained that ISG-016 "outlines technical positions defining specific acceptance criteria or an acceptable approach and includes information to be included in a [COL] application to fully address compliance with [sections 50.54(hh)(2) and 52.80(d)]."[36]

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[32] *See* LBP-09-21, 70 NRC __ (slip op. at 60) (admitting Intervenors as parties to the proceeding and ruling on nineteen of twenty-eight proposed contentions). *See also* LBP-09-25, 70 NRC __ (Sept. 29, 2009) (slip op.) (ruling on the remaining nine contentions).

[33] *See* LBP-09-21, 70 NRC __ (slip op. at 60). This proceeding is being held under our rules set forth in 10 C.F.R. Part 2, Subparts C and L. *See id.*

[34] 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).

[35] Issuance of Interim Staff Guidance DC/COL-ISG-016 – Compliance With 10 CFR 50.54(hh)(2) and 10 CFR 52.80(d), http://www.nrc.gov/reading-rm/doc-collections/isg/col-dc-isg-16.pdf (last visited May 14, 2010). ISG-016 specifically is geared toward mitigative strategies for new reactor designs.

[36] *Id.* As stated in the notice, a COL applicant or licensee would not be limited to the criteria outlined in ISG-016; applicants and licensees could propose other methods of satisfying the requirements in sections 50.54(hh)(2) and 52.80(d), which would be evaluated by the staff on a case-by-case basis.

Because the Staff determined that ISG-016 contains security-related SUNSI, the document has not been released to the public.[37]

Intervenors requested access to ISG-016 shortly after notice of its issuance was published on the NRC website. At the time of their request, Intervenors had been admitted as parties to the proceeding. In their request, Intervenors asserted that they "need th[e] document for meaningful participation in the adjudicatory proceeding," apparently operating under the terms of the Access Order.[38] According to Intervenors, without access to ISG-016 they will be unable to "meaningfully analyze applicants' claims" of compliance with the Power Reactor Security Rule.[39] Intervenors explained that they are unable to obtain this information from other guidance documents to which they have access – the Standard Review Plan, which is available publicly, and NEI-06-12, which certain members of the Intervenors, their counsel, and their consultant obtained pursuant to the Protective Order in this proceeding, but which is not keyed specifically to new reactor license applications.[40]

The NRC Staff denied Intervenors' request for access to ISG-016, asserting that Intervenors had not provided a sufficient basis "for the Staff to determine at this time that

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[37] *Id.* Intervenors have not challenged the Staff's determination that ISG-016 properly has been characterized as "security-related" SUNSI in accordance with the agency's current SUNSI Policy; that issue is not before us on appeal.

[38] E-mail from Robert V. Eye, counsel for Intervenors, to Office of the Secretary (Nov. 5, 2009 6:41 PM) (as amended by e-mails dated Nov. 5, 2009 6:49 PM and Nov. 9, 2009 7:03 PM) (SUNSI Request). In the same request, Intervenors sought access to ISG-016 in connection with the *Comanche Peak* COL proceeding. That request is not addressed here. *See infra* note 82.

[39] *Id.* at 1.

[40] *See id.*

[Intervenors] have demonstrated a legitimate need for access" to the document.[41] At the outset, the Staff determined that the Access Order "establishes the proper procedure for a party to request access to SUNSI."[42] The Staff acknowledged that Intervenors had demonstrated standing, thus meeting the first requirement of the Access Order.[43] With regard to the second requirement – the "need for SUNSI," the Staff found that Intervenors had not demonstrated with specificity: (1) why the publicly available versions of the application and the non-public information already obtained by Intervenors would be insufficient to form the basis for a proffered contention; and (2) the foundation for a proffered contention.[44] The Staff therefore denied Intervenors' request for failure to show a need for ISG-016 either for their already-proffered contentions or for any possible, but unspecified, new or amended contentions.[45]

Intervenors appealed the Staff's denial of access to the Board.[46] Intervenors repeated their reasons for seeking access to ISG-016, and asserted that ISG-016 "is every bit as relevant and material as NEI 06-12 and arguably, even more so given the express limitation that

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[41] Letter from Michael A. Spencer, counsel for NRC Staff, to Robert Eye, counsel for Intervenors (Nov. 16, 2009) at 2 (Staff Denial Letter).

[42] *Id.*

[43] *Id.*

[44] *Id.* at 2-3.

[45] *See id.*

[46] Letter from Robert V. Eye, counsel for Intervenors, to Administrative Judges Young and Gibson (Nov. 20, 2009) at 1 (Intervenors' Challenge to Denial of Access) (appealing the Staff's denial of access to both the *South Texas* and *Comanche Peak* Boards). Intervenors cited the *Comanche Peak* Access Order as authority for their appeal to the Board; the *Comanche Peak* and *South Texas* Access Orders are substantively identical as to appeal rights. *Id.*

NEI 06-12 is primarily intended to apply to currently operating nuclear plants."[47] In response to the appeal, the Staff maintained that "Intervenors have not met the standards for access set forth in the [Access Order]," that is, they had not shown how access to ISG-016 would assist them in formulating a contention.[48]

The Board sustained Intervenors' challenge to the denial of access. As a starting point in its analysis, the Board compared Intervenors' SUNSI request to a request for documents pursuant to the Freedom of Information Act (FOIA).[49] The Board observed that because Intervenors are seeking access to information in an adjudicatory proceeding, "the reasons for providing access to Intervenors are even more compelling than they are when a member of the public seeks information under FOIA."[50] Thus, the Board reasoned that Intervenors are "entitled to obtain documents under standards no more restrictive than would be accorded the general public under FOIA," and concluded that the "NRC Staff must carry the burden of proving that [a] document . . . fits . . . one of FOIA's specifically enumerated [exemptions]" in order to withhold the document from a party or a member of the public.[51] Further, the Board stated, even if portions of the document appropriately could be withheld from disclosure under a FOIA exemption, the Staff, in any event, would be required to produce the reasonably segregable

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[47] *Id.*

[48] *NRC Staff Reply to Intervenors' Challenge to the NRC Staff's Denial of Access to SUNSI* (Nov. 25, 2009) at 1, 3-6.

[49] LBP-10-2, 71 NRC __ (Jan. 29, 2010) (slip op. at 4).

[50] *Id.*

[51] *Id.*

portions that are subject to release after redacting the non-public material.[52] Using this framework, the Board directed the Staff to "conduct a paragraph-by-paragraph review of ISG-016 and provide Intervenors with those reasonably segregable portions that do not contain SUNSI" after redacting the document.[53]

The Board then turned to the applicability of the Access Order. Although noting that the Access Order, on its face, applied only to "potential parties," and not those who, like Intervenors, have been accorded party status, the Board assumed *arguendo* the continuing vitality of the Access Order.[54] The Board determined that under the Access Order a party requesting access to SUNSI need "only to explain its 'need for the information in order to meaningfully participate in this adjudicatory proceeding.' It requires nothing more."[55] Based on this interpretation, the Board determined that the Staff had misapplied the "need for SUNSI" standard by requiring Intervenors to show that the request for ISG-016 is, in the Board's terms, "directly applicable to

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[52] *Id.* (slip op. at 4-5).

[53] *Id.* (slip op. at 13, 19). Subsequent to the Board's decision in LBP-10-2, Intervenors filed a 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 Notice to Commission of Information Relevant to the NRC Staff Appeal of LBP-10-2* (July 13, 2010); 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). Because the Staff responded to Intervenors' FOIA request and provided a redacted version of ISG-016, we need not reach the question of the Board's authority to direct the Staff to redact the document.

[54] LBP-10-2, 71 NRC __ (slip op. at 8-9 & n.36).

[55] *Id.* (slip op. at 10) (quoting 74 Fed. Reg. at 7936).

an admissible contention."[56] Rather, the Board interpreted the Access Order to require the requested document to "be directly applicable to an admissible contention" "only . . . when a public version of the requested SUNSI document is also available."[57] Noting that a public version of ISG-016 was not available, the Board found that the Staff's denial of access on these grounds constituted the imposition of an unwarranted additional burden on Intervenors.[58]

Additionally, the Board analogized Intervenors' SUNSI request to a litigant's discovery request in a federal court proceeding. In this vein, the Board reasoned that similar to Federal Rule of Civil Procedure 26(b)(1), the "need for SUNSI" inquiry is essentially a relevance inquiry. That is, just as a federal court litigant must show that the information sought in discovery is relevant to its claims or defenses,[59] Intervenors must show that the document containing SUNSI is "reasonably calculated to lead to obtaining factual support for a new contention, factual support to augment a contention that has already been [pled], or evidence relative to an admitted contention."[60] Accordingly, the Board directed the Staff to reevaluate Intervenors' request using the Board's articulation of the "need for SUNSI" standard.[61] And, although it left the Staff to reevaluate Intervenors' need for ISG-016, the Board observed that Intervenors had demonstrated the requisite need, stating:

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[56] *Id.*

[57] *Id.* (citing 74 Fed. Reg. at 7936).

[58] *Id.*

[59] *See* Fed. R. Civ. P. 26(b)(1).

[60] LBP-10-2, 71 NRC __ (Jan. 29, 2010) (slip op. at 11 n.45).

[61] *Id.* (slip op. at 8, 19). It further directed the Staff to provide the Board with a memorandum describing its reevaluation efforts. *Id.* (slip op. at 19).

> Intervenors' 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 the[] regulations. Intervenors 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.[62]

The Staff timely filed the instant appeal challenging the Board's rulings. Intervenors oppose the appeal.[63]

## II. DISCUSSION

Our rules permit an appeal as of right by the NRC Staff on the question of whether a request for access to SUNSI should have been denied in whole or in part.[64] We review the Board's determination *de novo.*[65]

On appeal, the Staff argues that the Board misapplied the standards for access to SUNSI, and that the Board acted without authority in directing it to provide Intervenors with a redacted version of ISG-016.[66]

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[62] *Id.* (slip op. at 11).

[63] *Intervenors' Response Brief in Opposition to Staff's Appeal of LBP-10-02* (Feb. 19, 2010) (Intervenors' Opposition).

[64] 10 C.F.R. § 2.311(d)(2). *See also* 73 Fed. Reg. at 12,629-30.

[65] *See, e.g.*, *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27, 31 (2004); *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 67, 73 (2004). *Cf.* 5 U.S.C. § 552(a)(4)(B); *King v. U.S. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987). Intervenors cite *Catawba* for the proposition that the standard of review on appeal is abuse of discretion. *See* Intervenors' Opposition at 3 (citing *Catawba*, CLI-04-21, 60 NRC at 27). The principal issue on appeal in *Catawba* involved a Board evidentiary ruling regarding expert qualification, to which the abuse of discretion standard properly applied. *See Catawba*, CLI-04-21, 60 NRC at 27. For the related issue involving access to Safeguards Information, however, we stated that we would continue our practice in reviewing such issues "closely." *Id.* at 31.

[66] Staff Appeal at 6.

A. Applicability of the Access Order

As an initial matter, we address the question of the applicability of the Access Order. By its terms, the Access Order permits "potential parties" to request access to non-public information to support an initial request for hearing and petition to intervene; it does not address requests by parties to the proceeding. As discussed above, the Board expressed skepticism that the Access Order provides the appropriate standard for access to SUNSI at this stage of the proceeding, but nevertheless assumed *arguendo* its continuing vitality. On appeal, the Staff acknowledges that there is a question as to whether the Access Order applies, but argues that it is logical to apply it here because a requester's status as a "potential party" or "party" does not change the fact that the information is to be used to assist in the formulation of contentions.[67]

The Access Order does not apply to the circumstances presented here. Contrary to the Staff's argument, a requester's status as a "potential party" or "party" changes the analysis for determining whether the requester is entitled to obtain access to a document. 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.[68] The procedures embodied in the

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[67] *See id.* at 12-13. The Staff asserts that: (1) "the Access Order is the only Commission approved approach for adjudicating SUNSI or [Safeguards] access determinations"; (2) "it is logical to use the same approach for SUNSI requested to formulate . . . contentions both at the beginning of a proceeding and . . . throughout the proceeding"; and (3) even though the Staff is a party in litigation in the circumstances presented here, the Access Order "maintains the Staff's traditional role of making access determinations in the first instance, subject to review by a licensing Board." *Id.*

[68] 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.").

Access Order, on the other hand, were intended to fill a gap in our rules.[69] The purpose of the Access Order is to provide an avenue for access to documents through which potential parties already would have been accorded access but for their containing SUNSI or Safeguards Information. Accordingly, where, as here, a petition to intervene has been granted, we see no reason to depart from our discovery rules. Simply stated, the issue presented here is a discovery dispute. As discussed below, it involves the Staff's disclosure obligations.[70]

As relevant here, section 2.336(b) provides, among other things, that after issuance of the order granting leave to intervene, the Staff shall:

> disclose and/or provide, to the extent available (but excluding those documents for which there is a claim of privilege or protected status):
> . . . .
>
> (3) All documents (including documents that provide support for, or opposition to, the application or proposed action) supporting the NRC staff's review of the application or proposed action that is the subject of the proceeding.[71]

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[69] *See* 72 Fed. Reg. at 32,018.

[70] Our discovery rules impose disclosure obligations on the Staff that are somewhat different from those imposed on other parties. Under section 2.336(a), parties other than the Staff are required to disclose certain information *relevant to the admitted contentions*. *See* 10 C.F.R. § 2.336(a). The Staff's disclosure obligations, on the other hand, are not tied to the admitted contentions. Rather, the Staff must make available documents that relate to the application and its review as a whole. *See* 10 C.F.R. §§ 2.336(b), 2.1203. This obligation ordinarily ensures that intervenors have enough information to support existing contentions and to frame fresh ones (if new information emerges). To the extent that the Board would allow discovery to enable a petitioner to support or otherwise augment the formulation of an intervention petition, the Board would be in error. We have long held that discovery is not permitted before a petition to intervene has been granted. *See, e.g.*, *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 676 & n.73 (2008); *Wisconsin Electric Power Co.* (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928, 929 (1974).

[71] 10 C.F.R. § 2.336(b)(3).

For documents that are otherwise discoverable, but for which there is a claim of privilege or protected status, the Staff must list them and provide "sufficient information for assessing the[ir] . . . privilege or protected status."[72] A party seeking to challenge the Staff's claim of privilege or protected status may file a motion to compel production of the document.[73] If the Board determines that the party is entitled to obtain access to a document that has been claimed as privileged or protected, the Board may issue a protective order as necessary to prevent public disclosure of the document.[74] Alternatively, the parties may reach an agreement as to access and jointly propose a protective order.[75]

Intervenors have requested a draft interim staff guidance document that, in final form, is intended for use in the Staff's evaluation of compliance with 10 C.F.R. §§ 50.54(hh)(2) and

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[72] 10 C.F.R. § 2.336(b)(5).

[73] 10 C.F.R. § 2.323(h).

[74] 10 C.F.R. § 2.390(b)(6), (f). We have long held that "petitioners or intervenors may request and, where appropriate, obtain – under protective order or other measures – information withheld from the general public for proprietary or security reasons." *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 460 (2006) (and cases cited therein). *See also Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1214 (1985) ("Disputes frequently arise in which one party to a proceeding seeks purportedly proprietary information from another. Protective orders and in camera proceedings are the customary and favored means of handling such disputes."); *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 469 (1974) ("In Commission licensing proceedings, protective orders provide an effective means for safeguarding proprietary information, where . . . the party seeking discovery is not a competitor. Further, the rules differentiate between the release of information to the public and to interested parties, and provide that 'withholding from public inspection shall not affect the right, if any, of persons properly and directly concerned to inspect the document.' They explicitly authorize the use in appropriate circumstances of a protective order and of *in camera* sessions of the hearing.") (internal citations omitted).

[75] Here, a protective order is already in place to protect security-related SUNSI. *See supra* note 29.

52.80(d). To the extent the Staff intends to use ISG-016 in its evaluation of STPNOC's Mitigative Strategies Report, which is part of the COL application, ISG-016 would be included under 10 C.F.R. § 2.336(b)(3) as part of the Staff's disclosures.[76] Due to its security-related SUNSI categorization, the rules provide that the Staff would not have to produce ISG-016 in the first instance. Rather the Staff would be required to identify the document as part of its continuing duty of disclosure.[77] Assuming (as we do) that the Staff would seek to withhold the document, it would be required to provide sufficient information to support the Staff's claim of protected status.[78] Intervenors then would have an opportunity to seek access to the document, under the terms of the Protective Order already in place for this proceeding.

However, 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.[79] As indicated

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[76] *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"). A staff guidance document, used as one of perhaps many tools to assess an application's compliance with our rules, would, in our view, "support the Staff's review," and be subject to identification pursuant to this provision.

[77] *See* 10 C.F.R. § 2.336(d). In this proceeding, the parties, including the Staff, are required to update their disclosures on the first day of each month, "cover[ing] all documents or other material or information required to be disclosed that is in the possession, custody, or control of each party (or their agents) as of the fifteenth day of the preceding month." Initial Scheduling Order (Oct. 20, 2009) at 4 (unpublished).

[78] *See* 10 C.F.R. § 2.336(b)(5).

[79] Initial Scheduling Order at 5. *See also* Letter from Alvin H. Gutterman, counsel for STPNOC, to Licensing Board (Sept. 10, 2009) ¶ 1.

above, Intervenors have requested a *draft* version of ISG-016. It would seem to us that, but for the status of the document as a draft, Intervenors would be able to seek access to it through normal discovery channels.[80] 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 above.[81]

B. Further Guidance on "Need" for SUNSI

Given our ruling on the applicability of the Access Order, we need not reach the question whether the Staff appropriately assessed Intervenors' "need" for SUNSI. However, the issue of what is required to demonstrate a "need" for SUNSI has not been addressed by the Commission, and is likely to recur in a number of ongoing and future proceedings.[82] We

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[80] *See generally* Initial Scheduling Order at 7 (setting forth the terms for disclosure disputes and motions to compel).

[81] 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 STPNOC'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 July 1, 2010, August 2, 2010, or September 1, 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). Intervenors 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 7. On remand, the Board may want to explore with the parties whether Intervenors wish to continue their pursuit of the draft version considering that the guidance has now issued in final form.

[82] For example, we also decide today the Staff's appeal of a Board ruling applying the Access Order's "need" for SUNSI analysis in the *Comanche Peak* COL proceeding. *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). *See* LBP-10-5, 71 NRC __ (Mar. 11, 2010), *rev'd*, CLI-10-25, 72 NRC __ (Sept. 29, 2010) (slip op.).

therefore take this opportunity, in our supervisory capacity, to provide guidance on the "need" analysis, for use in those instances when an access order applies.[83]

In rejecting Intervenors' request for access to ISG-016, as well as on appeal, the Staff has taken a position concerning the showing required for "need" for SUNSI with which we disagree. As provided in the Access Order, in addition to showing a likelihood of establishing standing, a potential party must explain how the requested SUNSI is necessary for meaningful participation in the proceeding. In essence, this means that the request for SUNSI should include: (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;[84] and (2) an explanation of why existing publicly-available versions of the application would not be sufficient.[85] In the end, whether a request for SUNSI sufficiently demonstrates a "need" for the information will depend on the particular facts and circumstances presented.

A useful example is the *Indian Point* license transfer proceeding.[86] There, the petitioners sought access to an unredacted version of the license transfer application in order to obtain

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[83] *Cf. Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998) (recognizing the benefit of early Commission review as to matters involving "novel legal or policy questions").

[84] 74 Fed. Reg. at 7936-37.

[85] The showing could include, but does not require (nor is it limited to), an explanation that the information will be used as support for a contention. *See generally* 10 C.F.R. § 2.309(f)(1)(v). *See also infra* note 98 and accompanying text.

[86] When we made available for comment the access procedures that eventually were incorporated into the Access Order, we stated that the procedures were based on "principles that have previously been applied for access to sensitive financial information in license transfer proceedings." Proposed Access Procedures at 2.

confidential "financial information relevant to the expected costs of the plant's operation and maintenance" that had been redacted.[87] As part of the application, this information otherwise would have been available to the petitioners but for its being submitted to the NRC as confidential commercial and financial information.[88] The petitioners asserted that they needed access to this information because without it they would be unable to submit sufficiently specific and supported contentions regarding the applicant's financial qualifications.[89] Upon this showing of need, we granted the petitioners' request to obtain access to the unredacted application.[90]

For another illustration of this point, in this case, as discussed above, Intervenors (then petitioners) sought access to STPNOC's Mitigative Strategies Report – a document to which Intervenors would have had access if it did not contain sensitive information, given that it is part of the COL application. Because they were potential parties at the time of this request, the Access Order properly applied.[91] Pending at the time of their request was Intervenors' originally-proffered contention asserting that STPNOC's COL application failed to include the

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[87] *Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc.* (Indian Point, Units 1 and 2), CLI-01-8, 53 NRC 225, 227 (2001).

[88] *See generally* 10 C.F.R. § 2.790(a)(4), (b) (2000). Confidential commercial or financial information presumably would not be available from another public source.

[89] *Indian Point*, CLI-01-8, 53 NRC at 230. *See also* Letter from Timothy L. Judson, Citizens Awareness Network, Inc., to U.S. NRC (Feb. 20, 2001) at 15-17 (ML010570266) (enclosing *Citizens Awareness Network's Request for Hearing and Petition to Intervene in the License Transfers for Indian Point Nuclear Generating Unit Nos. 1 and 2*).

[90] *Indian Point*, CLI-01-8, 53 NRC at 230-31.

[91] Although the record for this proceeding does not contain Intervenors' (then petitioners) request for these documents, it is apparent that Intervenors and the Staff applied the Access Order. *See* Tr. at 32-34; Joint Motion for Protective Order.

information that later would be provided in the Mitigative Strategies Report. In our view, a statement that Intervenors needed the report to assess whether their original contention had been rendered moot, or a statement that the report was an essential source of information to determine whether to amend their original contention, would suffice to establish the requisite "need" for the document. The same is true for NEI-06-12, an industry guidance document, which likely would have been available to stakeholders if it did not contain security-related SUNSI. An explanation that Intervenors sought the document because STPNOC had used it in the preparation of its Mitigative Strategies Report, which was the subject of one of Intervenors' pending contentions, would suffice to establish "need."[92]

The Staff argues on appeal that Intervenors have not shown a need for ISG-016 because they have "not shown how access to a draft staff guidance document could help them prepare new contentions, when contentions must challenge the application."[93] The Staff continues 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. [ISG-016] is not part of the COL application, and therefore does not, by itself, demonstrate a dispute with the Applicant.'"[94] In its answer to Intervenors' challenge to the denial of access, the Staff again referenced the materiality requirement for an admissible contention in arguing

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[92] As stated above, the purpose of the Access Order is to provide direction for obtaining documents to which potential parties otherwise would have had access but for the documents' containing SUNSI or Safeguards Information. Under longstanding agency precedent, discovery is not permitted to uncover additional information supporting the admissibility of contentions. *See supra* note 70. The Access Order is consistent with this well-settled principle.

[93] Staff Appeal at 3.

[94] *Id.* at 8 (quoting Staff Denial Letter at 2) (second alteration in original).

that "[t]he admissibility of contentions does not hinge on access to a draft guidance document, which is not a legal requirement."[95]

But the Staff goes too far. The "need" for SUNSI analysis should not be conflated with the contention admissibility standards. A request for SUNSI must demonstrate how the information would assist in meeting the Commission requirements for intervention petitions, including formulation of a proposed contention. It does not require a showing that the contention will be *admissible* if it is formulated using that information. The Staff is correct that a contention must challenge the application,[96] and it is true that a guidance document does not create binding legal requirements.[97] However, in proffering contentions that challenge an application, a petitioner or an intervenor must provide support, including references to sources and documents on which it intends to rely.[98] A guidance document like ISG-016 could be one of those sources, particularly where, as here, the guidance purports to bear on the Staff's assessment of the application's conformance to our regulatory requirements. The Staff – as well as any other participant – is free to argue compliance with the contention admissibility standards at the appropriate time, which is in any answer to proposed contentions. The question of a contention's admissibility, however, is a separate inquiry from the threshold

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[95] Staff Reply at 5-6.

[96] *See* 10 C.F.R. § 2.309(f)(1)(vi), (f)(2).

[97] *See, e.g.*, *International Uranium (USA) Corp.* (Request for Materials License Amendment), CLI-00-1, 51 NRC 9, 19 (2000).

[98] *See* 10 C.F.R. § 2.309(f)(1)(v).

question whether a petitioner or putative petitioner has shown that it is entitled to obtain access to a non-public document.[99]

## III. CONCLUSION

For the reasons set forth above, we *reverse* the Board's ruling regarding access to the requested draft ISG-016, and *remand* the question of access to draft ISG-016 to the Board for further proceedings in accordance with this Memorandum and Order.[100] We *deny* the Staff's stay application as moot.[101]

IT IS SO ORDERED.[102]

For the Commission

**[SEAL]**

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

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

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[99] The Board raised several questions concerning the Staff's apparent practice of withholding in their entirety documents containing SUNSI, as well as the potential impact of this practice on our adjudicatory proceedings. *See* LBP-10-2, 71 NRC __ (slip op. at 11-17). The Board's concerns are not without force; we intend to look further into these questions outside of the adjudicatory process.

[100] This includes the Board's ruling that the Staff reassess Intervenors' showing of need for ISG-016.

[101] With the issuance of this Memorandum and Order, the housekeeping stay expires automatically. *See* Housekeeping Stay at 2.

[102] Commissioner Magwood did not participate in this matter.