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September 5, 2007

DOCKETED
USNRC

September 5, 2007 (4:40pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

U.S. Nuclear Regulatory Commission
Attn: Michael T. Lesar
Chief Rulemaking, Directives and Editing Branch
Office of Administration
Washington, D.C. 20555-0001

Re: RIN 3150-AI08
Proposed SUNSI-SGI Access Procedures

Gentlemen:

In response to the publication of "Availability for Comment of Proposed Procedures to Allow Potential Intervenors to gain Access to Relevant Records that Contain Sensitive Unclassified and Non-Safeguards Information or Safeguards Information," in the Federal Register on August 6, 2007 (72 Fed. Reg. 43569) ("Proposed Procedures"), Winston & Strawn LLP ("Winston & Strawn")¹ provides the following comments on the Proposed Procedures and the underlying rule.² These comments are based, in part, upon Winston & Strawn's experience in litigating contentions involving Safeguards Information ("SGI").³

¹ Winston & Strawn LLP is a law firm which represents utilities, which are the owners and operators of commercial nuclear power plants and which would be among the groups most directly affected by the Proposed Procedures and rulemaking.

² The Commission also reopened the comment period for "Interlocutory Review of Rulings on Requests by Potential Parties for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information; Reopening of Public Comment Period and Notice of Availability of Proposed Procedures for Comment" (72 Fed. Reg. 43569; August 6, 2007).

³ These comments also are applicable to SUNSI related to security issues.

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SECY-02

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Initially, the legal status and resulting enforceability of portions of these Proposed Procedures is unclear. For example, the pre-clearance procedures would apparently not be part of a regulation or even referenced therein.⁴ The Commission should implement the final version of such procedures in the way that all sections have the finality and enforceability of a rule, *e.g.*, by inclusion within an appendix to 10 C.F.R. Part 2.

The Commission should clearly establish that a potential intervenor is not entitled to all security-related information to draft contentions. The Proposed Procedures do not give appropriate weight to the inherent potential impact of the release of Safeguards Information to potential intervenors and their subject-matter experts in order to draft contentions. It is our experience that the most sensitive information concerning a nuclear power plant (or other licensed facility) is contained in controlled documents with extremely limited distribution which are utilized and stored only within the most secure areas of a licensed facility. Even the NRC does not normally maintain copies of the implementing details of a nuclear power plant security program that potential intervenors could request in accordance with these procedures. Any compromise of these documents could have a significant impact on the future ability of such facility to protect against sabotage or diversion. Winston & Strawn believes that it is reasonable and appropriate for the Commission to provide advance guidance to limit the extent of potential intervenor's requests under the Proposed Procedures to, at most, portions of the Security Plan as described in 10 C.F.R. § 73.55 (or equivalent sections of 10 C.F.R. Part 73 for other facilities). The disclosure of limited elements in this programmatic document, if justified by a potential intervenor, is clearly sufficient to allow a potential intervenor to describe alleged deficiencies relating to Commission requirements.⁵ With regard to disclosure of the Security Plan, the Commission should recognize that appropriate redactions would be necessary to protect sensitive and generic issues contained in the Plan.⁶

The Commission should prescribe stringent conditions for potential intervenors' access to any SGI made available. Given the consequences of a release of SGI, any review by a potential party (who might not ultimately even qualify for party status in the proceeding) must be conducted at a secure NRC facility under active "eye ball" monitoring by an SGI-qualified individual to assure no copying or duplication of the material provided. This element should be part of the final rulemaking and made applicable to all proceedings involving SGI to which it

⁴ In contrast, other parts of the Proposed Procedures would be reflected in individual notices of hearing.

⁵ Certain detailed portions of the Security Plan such as Licensee Safeguards Contingency Plans, should also be withheld in their entirety for the reasons discussed above.

⁶ For example, the details of the Commission's Design Basis Threat could be disclosed in such documents. Thus, inadvertent release of this information could affect all nuclear power plants, not only the one at issue.

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applies. The Commission should not allow the details of access to security documents to be left to Atomic Safety and Licensing Boards which have less experience in this area than does the Commission. The Commission should set a uniform policy through these Proposed Procedures.

The Commission must assure that the decision regarding the disclosure of SGI is based on the potential to positively affect the common defense and security. As part of the instant rulemaking, the Commission must provide instructions to its Atomic Safety and Licensing Board that they must do more than determine that a party has the potential for meeting the Commission's standing requirements (historically, not a difficult requirement) and has engaged an expert with experience to evaluate the SGI.⁷ In order to fulfill its responsibility to assure that the common defense and security prior to permitting potential parties access to SGI, the Commission must assure that the risk of disclosure of the information is balanced against the potential that the common defense and security would be enhanced by such disclosure. Such a balancing test is important to assuring the fulfillment of a vital part of the Commission's mission and not inconsistent with public participation in the agency's decisionmaking. Applicants for access to SGI information should be required to demonstrate, based upon specific examples of the intervenor's past participation in NRC proceedings or by reference to the experience of the potential intervenor's proposed expert, that the party or expert has already made a positive contribution to the enhancement of the common defense and security or the security of vital infrastructure facilities similar to licensed nuclear facilities. For example, if a proposed expert's qualifications or positions relating to admitted contentions were rejected in a previous NRC proceeding, this would represent a presumption of a lack of potential to contribute in another proceeding.

The Commission should require potential intervenors and their experts to obtain advance SGI clearance. The proposed procedures permit an optional procedure for potential intervenors and their experts to obtain an SGI pre-clearance within 180 days of the projected date of the filing of an application.⁸ It appears that there would be no real incentive in the Proposed Procedures to obtain such clearance in advance. This is inconsistent with the Commission's expectation that all adjudicatory proceedings should be expedited to the extent possible. Based on past experience and the unique nature of the qualifications and desire of potential parties to

⁷ With regard to the qualifications of experts, based on experience, the Commission should specify that the proposed expert must have education, training or experience regarding the specifics of protective strategy, equipment, tactics, etc. in meeting Commission security requirements. Generalized policy experience or speculative writings should be deemed by the Commission as not supporting access to SGI relating to the protective strategy of a facility and the implementing tactics.

⁸ The Commission sets a target date of six months to obtain SGI clearance. It is not clear how the Commission determined this time period inasmuch as utilities are able to grant SGI in significantly shorter times.

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participate in this narrow aspect of nuclear power plant proceedings, the Commission should require, as the norm, that the representatives of potential intervenors and their experts obtain pre-clearance for NRC proceedings. The nominal cost for processing of these applications, now \$172.50, would seemingly not be a bar to the limited number of individuals which wish to participate in future Commission proceedings involving SGI. The number of individuals who would be affected, both on a per case basis (estimated to be one or two individuals) or for all proceedings, would be small. With SGI determinations being effective for five years, such required pre-clearance would not be burdensome and would not significantly affect the ability of intervenors to participate in proceedings involving SGI. It could, according to the schedule contained in Attachment 2 to the Proposed Procedures, advance the consideration of security contentions by six months or more. If not pre-cleared, potential intervenors would have to demonstrate that it was not possible for them to have complied with the pre-clearance requirement in a timeframe to prevent any delay in consideration of security contentions despite diligent efforts.⁹

In addition to these comments, Winston & Strawn supports the comments submitted by the Nuclear Energy Institute on the Proposed Procedures. If you have any questions concerning these comments, please give me a call.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark J. Wetterhahn', with a stylized, cursive script.

Mark J. Wetterhahn

⁹

Individuals who have been cleared for SGI would be under an obligation to disclose subsequent arrests or information which could potentially disqualify them from access to SGI only when they declared that they wished to participate in a particular upcoming proceeding.

From: "Wetterhahn, Mark" <MWetterh@winston.com>
To: <nrcprep@nrc.gov>
Date: Wed, Sep 5, 2007 9:14 AM
Subject: RIN 3150-A108; Proposed SUNSI-SGI Access Procedures

Attached is a letter providing comments on the subject procedures and rulemaking. If you have any questions, please call me at (202) 282-5703. Please acknowledge receipt of these comments.

Mark J. Wetterhahn

<<Comments.pdf>>

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From: Carol Gallagher
To: SECY
Date: Wed, Sep 5, 2007 12:08 PM
Subject: Fwd: RIN 3150-A108; Proposed SUNSI-SGI Access Procedures

Van,

I'm forwarding a comment that came to us. It should be docketed by SECY.

Thanks,
Carol

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Subject: RIN 3150-A108; Proposed SUNSI-SGI Access Procedures
Creation Date Wed, Sep 5, 2007 9:13 AM
From: "Wetterhahn, Mark" <MWetterh@winston.com>

Created By: MWetterh@winston.com

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