

February 12, 2020

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**RE: Interim Storage Partner's Waste Control Specialist CISF, Docket No. 72-1050; Appeal of Staff Denial of Petitioners' Request for SUNSI Information Related to ISP's Responses to RAIs.**

Dear Judges Ryerson, Trikouros, Arnold and the NRC Commission,

On January 16, 2020, Fasken and PBLRO ("Petitioners") in the above-referenced docket requested access to SUNSI-protected portions of Interim Storage Partner's (ISP's) response to RAIs.<sup>1</sup> On January 27, NRC Staff denied this request. Please consider this correspondence as our appeal of Staff's denial.

In its denial, Staff concluded that access procedures to SUNSI-related information "no longer apply once an intervention petition is granted."<sup>2</sup> In the *South Texas Project* decision, the

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<sup>1</sup> Specifically, Petitioners requested access to Figures 3.1-5, 3.1-6, 3.1-7, 3.1-8, Attachment LU-2-1 and a native (spreadsheet) file containing references to oil and gas well locations, types, depths, and other relevant information that could relate to Petitioner's Second Contention regarding oil and gas wells.

<sup>2</sup> Citing *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), CLI-10-24, 72 NRC 451, 461 (2010).

Commission stated that 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.” *Id.* at 462. Given that the Commission has not addressed Petitioners’ appeal of the ASLB’s order denying their petition, Petitioners are still potential parties to this proceeding<sup>3</sup> and therefore should have been granted access to the requested SUNSI information upon their adequate showing of need.<sup>4</sup>

Even if Petitioners are not deemed “potential parties,” limiting access to SUNSI information solely to intervenors prevents petitioners, and intervenors whose admissible contentions are eventually dismissed, from meaningfully participating in the proceedings. In *South Texas Project*, the Commission stated that Staff has an obligation to make documents available to “ensure[] that intervenors have enough information to support existing contentions and to frame fresh ones (if new information emerges).”<sup>5</sup> Therefore, the only way to support existing contentions based on newly submitted SUNSI information is for a party to be an intervenor.

Restricting access to SUNSI information in this fashion is grossly irrational. For instance, in this given proceeding, only one party had this opportunity to access new, SUNSI-related material. On August 23, 2019, after the ASLB granted its petition to intervene, Sierra Club became the only intervenor in the above-mentioned proceedings. On November 18, 2019, less than three months later, and after ISP provided the missing information that Sierra Club’s contention was premised upon, the ASLB ordered that Sierra Club’s contention was moot and dismissed their petition. Had ISP submitted new SUNSI information between August 23 and November 18, Sierra Club would have been able to request access to that information had it shown “good cause” and a “need” for the given information. However, since the record was closed on December 13, 2019, no party, including Petitioners, has the ability to amend previously-filed contentions based on newly submitted SUNSI information unless they can successfully reopen the record and become an intervenor by proffering a new or amended contention based on non-SUNSI information.<sup>6</sup> To

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<sup>3</sup> The NRC's interpretation that "potential party" access requires a filed admissible contention is contrary to its own definition of "potential party" found at 10 CFR 2.4 ("potential party" means 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) (emphasis added).

<sup>4</sup> To show a “need,” “...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; and (2) an explanation of why existing publicly-available versions of the application would not be sufficient.” *South Texas Project*, 72 NRC at 465 (emphasis added).

<sup>5</sup> *Id.* at 462, n. 70.

<sup>6</sup> “To the extent that the Board would allow discovery [of SUNSI information] to enable a petitioner to support or otherwise augment the formulation of an intervention petition, the board would be in error. [The Commission] has long held that discovery is not permitted before a petition to intervene has been granted.” *Id.*; See also *Metropolitan Edison Co.* (Three Mile Island

place a restriction on access to *relevant* SUNSI information provided by an applicant after all contentions in a proceeding are dismissed and the record is closed by the ASLB allows new information to be covered up without fear that it will be challenged. This is a violation of Petitioners' due process rights afforded by Fed. R. Civ. P. 26(b)(1).<sup>7</sup> Without access to this information, Petitioners will never know whether their contention is moot or needs to be amended.

Petitioners criticize the proprietary nature of the information withheld. Petitioners require access to ISP's alleged SUNSI information because it is directly relevant to Petitioners' oil and gas contention currently on appeal. Access to this information will provide Petitioners the understanding whether their oil and gas contention needs to be amended and whether the information satisfies ISP's burden of complying with 10 C.F.R. § 72.103(a)(1).<sup>8</sup> ISP's SUNSI information is also directly related to whether ISP's application complies with 10 C.F.R. § 51.54(b) and 10 C.F.R. § 51.45(b)(1).

It is Petitioners' understanding that presently there are no publicly available versions of Figures 3.1-5, 3.1-6, 3.1-7, 3.1-8, Attachment LU-2-1 and the native (spreadsheet) file referenced in ISP's response to RAIs. Given that Petitioners have proven a need to access these files, we pray that the ASLB and/or the Commission will grant access to this information.

Given that Petitioners have appealed the ASLB's decision denying their original petition and that a final decision has not been issued by the Commission in the above-referenced proceeding, 10 C.F.R. § 2.318(a) appears to retract the Board's jurisdiction to consider amended contentions and access to SUNSI information and gives the Presiding Officer continuing jurisdiction with the authority to consider this issue up until the time a final decision has been made by the Commission. Given the uncertainty of jurisdiction, Petitioners file this appeal before both the Board and the Commission to ensure that it is properly considered.

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Nuclear Station, Unit No. 1), CLI-85-7, 21 NRC 1104, 1106 (1985) ("The movant is not entitled to engage in discovery in order to support a motion to reopen.").

<sup>7</sup> See Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case"); See also *South Texas Project Nuclear Operating Co.*, (South Texas Project Units 3 and 4), LBP-10-02, 71 NRC 190, 203 (2010) (The ASLB "view[s] the standard for obtaining access to SUNSI similar to that used in determining whether a discovery request is permissible under the Federal Rules of Civil Procedure."); *Progress Energy Florida, Inc.* (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2) LBP-10-23, 72 NRC 692, 706 (2010) ("The NRC's mandatory disclosure regulations are based on FRCP 26.")

<sup>8</sup> The Commission has stated that "[i]n 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." *South Texas Project*, 72 NRC at 465.

Respectfully submitted,

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**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
Before the Atomic Safety and Licensing Board  
and  
The Commission**

In the Matter of	)	Docket No. 72-1050
	)	
Interim Storage Partners, LLC	)	February 12, 2020
	)	
(Waste Control Specialists Consolidated	)	
Interim Storage Facility)	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on February 12, 2020 a copy of Petitioners' February 12, 2020 Letter Appealing NRC Staff Denial of Petitioners' Request for SUNSI Information Related to ISP's Responses to RAIs was served by the Electronic Information Exchange on the following recipients:

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