UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of
South Texas Project Nuclear Operating Co.
Application for the South Texas Project **Docket Nos. 52-012, 52-013**
Units 3 and 4
Combined Operating License

INTERVENORS' RESPONSE TO APPLICANT'S MOTION TO DISMISS CONTENTION 16 AS MOOT

The Intervenors object to the Applicant's Motion to Dismiss Contention 16 as Moot. In support of this objection the Intervenors offer the following arguments and authorities.

Contention 16 is not moot based on the Applicant's response to the NRC's RAI. Applicant assumes groundwater consumption for Units 3 & 4 to be limited to 975 gpm based on a "normal case" groundwater demand. However, groundwater demand could be as high as 3434 gpm for "maximum short-term steady-state conditions". [1]

This ASLB Panel admitted Contention 16 as follows:

> The Environmental Report fails to consider adequately the environmental impact of the possible withdrawal of additional groundwater in excess of that authorized by the current permits.[2]

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[1] Consumption at the 975 gpm rate is equivalent to 1574 ac-ft/yr. Usage of 3434 gpm rate is equivalent to 5543 ac-ft/yr. Intervenors recognize that the 3434 gpm rate is based on a "short-term" use rate. However, the Applicant apparently recognizes that groundwater use actually ranges between the normal case 975 gpm and 3434 gpm. The Applicant has not provided data that specify any anticipated duration during which consumption would exceed 975 gpm. Instead, the Applicant assumes consumption will not exceed normalized rates notwithstanding its admission that at some unspecified frequency and duration usage could exceed normal rates by over 300%.
[2] Memorandum and Order Ruling on Admissibility of Contentions 8-16, 29 September 2009, p. 31.

The Applicant has moved to dismiss this contention on the premise that the projected annual groundwater use by all four units will not exceed 3,000 acre-feet.[3] The Applicant assumes that Units 1 and 2 consume groundwater at an average of 798 gpm (1288 ac-ft/yr) based on historical usage rates from 2001 to 2006.[4] The Applicant asserts further that Units 3 and 4 are projected to use 975 gpm (1574 ac-ft/yr) for a predicted total of 1773 gpm (2862 ac-ft/yr). However, this prediction is qualified in several material ways by the Applicant.[5]

First, the Applicant concedes that the 2862 ac-ft/yr assumes "normal case" and concedes that there may be periods of "maximum case" usage that could reach 3434 gpm or 5543 ac-ft/yr.[6] There is no explanation as to the circumstances that would require pumping groundwater at the 3434 gpm rate, nor is there any explanation as to the frequency or duration that would require pumping at 3434 gpm.

The Applicant's normal case projection of 2862 ac-ft/yr for all four units only leaves a 4.6% margin to avoid exceeding their current permit. The Applicant does not assume anything but "normal case" consumption though its own data suggest that the actual range of consumption could be significantly higher, though presumably, for shorter durations. The Applicant's failure to discuss the (1) basis for the range between "normal" and "maximum" usage, (2) circumstances in which the "normal case" is exceeded, (3) expected frequency and (4) duration(s) when the

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[3] Applicant's Motion to Dismiss, 8 October 2009. ("Motion") p. 3.
[4] Intervenors contend that the data set in ER Table 2.3.2-18 (RAI Response, Attachment 5, p. 9), which only addresses STP 1 & 2 groundwater use for 2001-2006, is inadequate to draw conclusions regarding actual historical groundwater use. The Applicant should have to produce all groundwater usage data from the beginning of operation to present. The Applicant arbitrarily chose this 5-year period of time that may or may not be representative of actual historical use.
[5] STPNOC Response to Request for Additional Information, 28 September 2009 ("RAI Response"), *available at* ADAMS Accession No. ML092730285. Attachment 5, p. 5.
[6] RAI Response, Table 2.3.2-19, Attachment 5, p. 9.

"normal" case is exceeded is a material omission. This omitted discussion is particularly material in light of the tight 4.6% margin that even the "normal" case presents. Failure to do so makes this a basis for an omission contention. 10 C.F.R. § 2.309(f)(1)(iv), *Pa'ina Hawaii, LLC (Materials License Application),* LBP-06-12, 63 NRC 403, 414 (2006)

The second qualification is the Applicant's concession that, in the case of Units 1 and 2, an unquantified "small but not insignificant portion" of groundwater has been diverted to the MCR.[7] The Applicant attributes this to "manual control" of the groundwater well pump and if automated controls are installed this diversion could be avoided.[8] The Applicant makes no commitment to install such automated controls.[9] The Applicant fails to discuss whether the diversions to the MCR cause a drawdown of groundwater greater than expected without the diversion. Again, in light of the small 4.6% margin for error the Applicant's failure to discuss the effects on groundwater drawdown of the diversion makes this a material omission contention. 10 C.F.R. § 2.309(f)(1)(iv), *McGuire/Catawba,* 56 NRC at 383.

Third, the Applicant proposes to further tighten the margin by adding a 500 gpm groundwater pumping capacity.[10] The Applicant does not discuss how this additional capacity affects the probability of drawdowns in excess of permit limits. The failure to address this circumstance is a material omission. 10 C.F.R. § 2.309(f)(1)(iv), *McGuire/Catawba,* 56 NRC at 383.

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[7] RAI Response, Attachment 5, pp. 5,16,20,23
[8] *Id.*
[9] "There are no commitments in this letter." Cover Letter of RAI Response. p. 1.
[10] RAI Response , Attachment 5, p. 6.

Contention 16, as admitted, specifies that the Applicant must evaluate the environmental impacts of "possible" groundwater use above the current permit amount of 3,000 ac-ft/yr. Based on the Applicant's own data it is certainly possible and, given the tight margin, even likely that Units 1-4 groundwater usage could exceed the 3,000 ac-ft/yr allowed under the existing permit. Given the strong possibility/ likelihood of excessive drawdowns the contention is far from moot.

The issue is not, as Applicant infers, whether it intends to seek a permit for additional groundwater use.[11] The material question is whether there is a reasonable possibility that groundwater use could exceed 3000 ac-ft/yr. or 9000 ac-ft over a three-year period. Again, based on the Applicant's own data, there is more than a possibility of excessive groundwater usage.

The Applicant also fails to address the question of whether diminished surface water supplies due to drought will lead to an increase in drawdown on groundwater supplies. The Lower Colorado River Authority is currently discussing declaring the current drought as worse than the drought of record in the 1950s.[12] If this happened, surface water rights to STP could be cut back by the LCRA.[13] Will STP increase their drawdown on groundwater supplies if its surface water rights are reduced, further eroding the 4.6% margin?

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[11] Motion, pp. 4-5.

[12] "Staff analysis, presented to LCRA's [Lower Colorado River Authority] Board of Directors at its Sept. 23 meeting, show that, at least in its intensity, the current drought is more intense than the drought of the 1950s," also known as the drought of record. LCRA, *Intensity of drought surpasses previous droughts.* 24 September 2009. Available at: http://www.lcra.org/newsstory/2009/droughtintensityincreases.html
"The Lower Colorado River Authority could soon ask the state environmental agency [TCEQ] to declare the current drought worse than the one in the 1950s, also known as the drought of record." Price, Asher. *River authority tells rice farmers that less water might be available.* Austin American-Statesman, 14 October 2009. Available at: http://www.statesman.com/news/content/news/stories/local/2009/10/14/1014rice.html

[13] "If the current drought ultimately is worse than the drought of record, then all water users in the lower Colorado River basin will be affected … including … industrial customers." LCRA, *Intensity of drought surpasses previous droughts.* 24 September 2009. Available at: http://www.lcra.org/newsstory/2009/droughtintensityincreases.html

Moreover, the Applicant fails to address the relationship between drought and decreased groundwater availability.[14] It is reasonable to expect that in a time of drought that is worst than the drought of record that there will be an increase in the drawdown of groundwater resources. A Texas Water Development Board's 2006 report, entitled "Aquifers of the Gulf Coast of Texas" found that "Drought can affect groundwater supplies in many ways—low precipitation levels can lead to reduced recharge to the aquifer and increased pumping by users."[15] This furthers the need for an analysis of the environmental impacts of groundwater withdrawal in excess of the current permitted amount.

Contrary to the Applicant's assertion, the question of groundwater usage has not been "fully addressed by the conclusion in the RAI response."[16] In fact, the response raises further questions and exposes gaps in the Applicant's predictions for groundwater use. The mere submission of the response should not be considered sufficient to render the contention moot without a determination of the adequacy of the information therein. *McGuire/Catawba*, CLI-02-28, 56 NRC 373, 383 (2002).

Finally, the NRC Technical Staff who submitted the RAI has not indicated that the response is satisfactory. Accordingly, it is premature to assume that the information submitted is

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If the drought is worse than the drought of record, "the agency [LCRA] would consider cutting back firm water rights across the board until the drought let up." Price and Caputo. *Water helps fuel debate on the STP*. San Antonio Express-News, 13 September 2009. Available at: http://www.mysanantonio.com/livinggreensa/59147242.html

[14] The Applicant has chosen groundwater usage data for STP Units 1 and 2 that falls outside a period of intensified drought in 2007-2009.

[15] Chapter 1 of Texas Water Development Board's 2006 report, entitled "Aquifers of the Gulf Coast of Texas." Available at: http://www.twdb.state.tx.us/publications/reports/GroundWaterReports/GWReports/R365/ch01_intro.pdf

[16] Motion, p. 5.

adequate and does not prompt follow-up RAI's. Intervenors suggest that the Panel consider the Technical Staff's evaluation of the Applicant's response prior to deciding the *instant* motion.[17]

The Atomic Energy Act, 42 U.S.C. 3177(d) requires that an operating license not be issued unless such is consistent with the public interest. Here, the Panel should err on the side of caution and require an analysis of environmental impacts of groundwater usage at a reasonable level over 300 ac-ft/yr or 9000 ac-ft per 3 years. *Ohio River Valley Environmental Coalition,Inc.v. Kempthorne*, 473 F.3d 94,102 (4th Cir., 2006) (Administrative Procedure Act directs review of agency action to determine if decision is product of consideration of relevant factors and whether a clear error of judgment has occurred.) *Druid Hills Civic Association, Inc., v. Federal Highway Administration*, 772 F. 2nd 700, 709 11th Cir. (1985) (NEPA requires that environmental analyses not be limited by an "artificial framework").

Conclusion

Intervenors contend that Contention 16 is not moot and based on the arguments and authorities cited herein the *instant* motion should be denied.

[17] Intervenors do not argue that the Panel is bound by any such Technical Staff evaluation of the RAI response. And any Staff acceptance of the response as adequate should not be interpreted as assent thereto or agreement therewith by Intervenors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2009 a copy of "Intervenors' Response to Applicant's Motion to Dismiss Contention 16 as Moot" was served by the Electronic Information Exchange on the following recipients:

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