

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
)
STP NUCLEAR OPERATING COMPANY) Docket Nos. 52-012 & 52-013
)
)
(South Texas Project, Units 3 & 4))

NRC STAFF'S BRIEF IN OPPOSITION
TO INTERVENORS' APPEAL of LBP-10-02

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NRC STAFF'S BRIEF IN OPPOSITION
TO INTERVENORS' APPEAL OF LBP-10-02

INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b), the staff of the Nuclear Regulatory Commission (Staff) hereby files a brief in opposition to intervenors' February 9, 2010, "Notice of Appeal" (Notice) and "Brief in Support of Intervenor's Appeal of Atomic Safety and Licensing Board Order of January 29, 2009" (Appeal) (non-public). The Board's Order of January 29, 2009 concluded that intervenors' seven contentions regarding the South Texas Project Nuclear Operating Company's (STP or Applicant) Mitigative Strategies Report were inadmissible. *South Texas Project Nuclear Operating Co.* (South Texas project Units 3 & 4), LBP-10-02, 71 NRC __, __ (Jan. 29, 2010) (slip op. at 32) (non-public).¹ Intervenor's appeal the Board's

¹ Pursuant to Commission policy and the Board's July 1, 2009, protective order, the Board entirely redacted its discussion of the intervenors' contentions from the public version of LBP-10-02 because the discussion contained sensitive unclassified non-safeguards information (SUNSI). *South Texas Project Nuclear Operating Co.* (South Texas project Units 3 & 4), LBP-10-02, 71 NRC __, __ (slip op. at 18) (Feb. 16, 2010) (public). In its discussion of the intervenors' contentions, the instant brief paraphrases and quotes from portions of the Board's order that were issued under seal. Although the Staff has determined that the contents of this brief do not contain SUNSI, the Staff is filing this brief under seal pursuant to the Board's protective order because it contains material that was issued under seal by the Board. Further references to LBP-10-02 in this brief will be to the non-public version of the Board's order.

conclusions regarding three of the seven contentions. Appeal at 5 n.11.² For the reasons set forth below, Intervenor's Appeal should be denied because Intervenor's have not shown that its Appeal meets the requirements of 10 C.F.R. §§ 2.311 or 2.341(f)(2). Further, the Appeal should be denied because the Board properly found that the Intervenor's contentions were not admissible. Therefore, the Board's rulings regarding the admissibility of contentions MS-1, MS-3 and MS-6 should be affirmed.

STATEMENT OF THE CASE

This proceeding involves an application by STP for combined licenses (COLs), which was submitted on September 20, 2007 (Application). In response to a Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene issued February 20, 2009 (74 Fed. Reg. 7934), SEED Coalition, South Texas Association for Responsible Energy, and Public Citizen (collectively, Intervenor's) submitted a petition to intervene on April 21, 2009 (Petition).³ Intervenor's Petition included 28 contentions, five of which the Board ruled were admissible. *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 and 4), LBP-09-21, 70 NRC ___ (slip. op) (Aug. 27, 2009) (admitting Contention 21); *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 and 4), LBP-09-25, 70 NRC ___ (slip. op) (Sept. 29, 2009) (slip op.) (admitting Contentions 8, 9, 14, 16).

On May 26, 2009, the Applicant filed a Mitigative Strategies Report addressing the requirements of 10 C.F.R. § 50.54(hh)(2). Letter from Steven P. Frantz, Morgan, Lewis &

² Intervenor's state that their appeal only addresses Contentions MS-1, MS-3 and MS-6. Appeal at 5, n.11. Intervenor's do not challenge the Board's conclusions regarding the admissibility of MS-2, MS-4, MS-5, or MS-7.

³ The Staff and Applicant submitted timely answers to the Petition on May 18, 2009. See NRC Staff's Answer to Petition for Intervention and Request for Hearing (May 18, 2009); STP Nuclear Operating Company's Answer Opposing Petition for Intervention and Request for Hearing (May 18, 2009). Intervenor's timely replied on May 26, 2009. See Petitioner's Reply to Applicant's Answer to Petition for Intervention and Request for Hearing (May 26, 2009).

Bockius to the Board, "Notification of Filing Related to Proposed Contention 2" (ML091470724) (May Letter).⁴ Intervenors filed seven new contentions - MS-1 through MS-7 - based on the Applicant's Mitigative Strategies Report on August 14, 2009 (Mitigative Strategies Contentions) (non-public). The Staff and Applicant filed answers to Intervenors' Mitigative Strategies Contentions on September 8, 2009, and September 4, 2009, respectively. NRC Staff's Answer to Intervenors' Contentions and Request for Subpart G Hearing (Sept. 8, 2009) (Staff Answer) (non-public); STP Nuclear Operating Company's Answer Opposing Late-Filed Contentions Regarding the Mitigative Strategies Report (Sept. 4, 2009) (Applicant Answer) (non-public). Both the Staff and Applicant argued that the Mitigative Strategies Contentions were inadmissible. Intervenors responded to the Staff's and Applicant's answers on September 15, 2009. Intervenors' Consolidated Response to the Answers of Applicant and NRC Staff to the Intervenors' Contentions Regarding 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2) (Response) (non-public). The Board held oral argument on the admissibility of these contentions on November 13, 2009. Transcript, South Texas Project Nuclear Company Units 3 and 4 (Nov. 13, 2009) (portions non-public).

On January 29, 2010, the Board issued an order ruling that the seven Mitigative Strategies Contentions were inadmissible. See *South Texas*, LBP-10-02, 71 NRC at ___ (slip op. at 33). Intervenors now appeal the Board's decision with respect to three of the seven contentions - MS-1, MS-3, and MS-6. Appeal at 5 n.11.

⁴ The Applicant's Mitigative Strategies Report is not publicly available because it contains security-related information. See May Letter at 1. Pursuant to the Board's July 1, 2009 Protective Order, Intervenors sought access to the Applicant's Mitigative Strategies Report. The Applicant transmitted this report to Intervenors in accordance with the Protective Order, on July 1, 2009. The Intervenors have also been provided access to NEI 06-12, Revision 2 (non-public), in accordance with the Protective Order.

STATEMENT OF THE ISSUES

There are two issues presented. First, whether Intervenors have satisfied the Commission's requirements for interlocutory review of a Board decision denying contention admissibility. Intervenors' Appeal should be denied if it does not meet the requirements of 10 C.F.R. §§ 2.311 or 2.341(f)(2). Second, whether the Board erred in concluding that Contentions MS-1, MS-3 and MS-6 are inadmissible. The Board's decision regarding the three challenged contentions should be reversed only if it committed an error of law or abuse of discretion causing it to wrongly reject Intervenors' arguments regarding these contentions. See *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006).

LEGAL STANDARDS

I. Legal Standards for Review of a Board Order Denying Contention Admissibility.

The Commission's regulations provide for interlocutory review of rulings on requests for hearings/petitions to intervene, selection of hearing procedures, and requests by potential parties for access to sensitive unclassified non-safeguards information and safeguards information in a limited number of circumstances. See 10 C.F.R. § 2.311. A ruling on a request for hearing or a petition to intervene is only appealable on the questions as to whether the request/petition should have been granted or as to whether the request/petition should have been wholly denied. See 10 C.F.R. § 2.311(c), (d). Other than the circumstances enumerated in § 2.311, "[n]o other appeals from rulings on requests for hearings are allowed." 10 C.F.R. § 2.311(b) (emphasis added). "Section 2.311 does not provide for interlocutory appeals by an admitted intervenor, and the Commission generally 'disfavor[s] interlocutory, piecemeal appeals.'" See *Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-07-02, 65 NRC 10, 11-12 (2007) (quoting *Exelon Generating Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 466 (2004)).

However, the Commission may, in exceptional circumstances, pursuant to 10 C.F.R. § 2.341(f)(2), "grant a petition for interlocutory review where a party demonstrates that a ruling threatens it 'with immediate and serious irreparable impact' or '[a]ffects the basic structure of the proceeding in a pervasive or unusual matter.'" *Id.* at 12 (quoting 10 C.F.R. § 2.341(f)(2)). The Commission has, however, explained that NRC rules "set a high bar for interlocutory review petitions." *Vermont Yankee, LLC, & Entergy Nuclear Operations* (Vermont Yankee Nuclear Power Station), CLI-07-01, 65 NRC 1, 3 (2007). "'Claims that a board has wrongly rejected a contention . . . are commonplace' and cannot without more 'be said to affect a proceeding's basic structure'" *Pilgrim*, CLI-07-02, 65 NRC at 12 (quoting *Exelon Generating Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 467 (2004)).

The legal standards applicable to the Commission's review of Board rulings are set forth in Commission adjudicatory decisions. These decisions state that the Commission will give substantial deference to a Board's determinations on threshold issues and will regularly affirm Board decisions on issues of admissibility of contentions where the appeal fails to point to an error of law or abuse of discretion. See *AmerGen Energy Company, LLC*, (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006) (citing *USEC Inc.* (American Centrifuge Plant), CLI-06-09, 63 NRC 433, 439 n.32 (2006)).

A petitioner appealing a Board's denial of intervention "bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Stations, Units 2 and 3), CLI-04-36, 60 NRC 631, 639 n.25 (2004) (quoting *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994)). The Commission applied this principle in *Millstone* to reject on

appeal "general arguments" that failed to "come to grips with the Board's reasons for rejecting" the contention. *Millstone*, CLI-04-36, 60 NRC at 639.

II. Legal Standards for Contention Admissibility

The legal requirements governing the admissibility of contentions are well established and are currently set forth in 10 C.F.R. § 2.309(f) of the Commission's Rules of Practice.

Section 2.309(f) provides:

- (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:
 - (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
 - (ii) Provide a brief explanation of the basis for the contention;
 - (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
 - (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding
 - (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;
 - (vi) . . . provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief; . . .

10 C.F.R. § 2.309(f)(1). The Commission has emphasized that the rules on contention admissibility are "strict by design." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration*

denied, CLI-02-01, 55 NRC 1 (2002). Failure to comply with any of these requirements is grounds for the dismissal of a contention. Final Rule, "Changes to the Adjudicatory Process," 69 Fed. Reg. 2182, 2221 (Jan 14, 2004); see also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Ariz. Pub. Serv. Co. et al.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991). "Mere 'notice pleading' does not suffice." *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006).

DISCUSSION

I. Intervenors' Appeal Should Be Dismissed Because It Does Not Meet the Requirements of 10 C.F.R. §§ 2.311 or 2.341(f)(2) for Interlocutory Review.

Intervenors submit in their February 9, 2010, Notice that their Appeal was submitted pursuant to 10 C.F.R. §§ 2.311. Notice at 1. Intervenors' Notice and Appeal do not, however, meet the requirements of § 2.311. This Section allows an appeal of an order denying a request for hearing or a petition to intervene only if the request or petition was wholly denied. See 10 C.F.R. § 2.311(c). Appeals of rejected contentions are permitted "only where a petitioner 'claims that the Board wrongly rejected all contentions.'" *Pilgrim*, CLI-07-02, 65 NRC at 11 (quoting *Oyster Creek*, CLI-06-24, 64 NRC at 119).⁵ Section 2.311 does not "provide for interlocutory appeals by an admitted intervenor." *Id.* at 11-12. Here, the Board admitted Intervenors as a party to the proceeding, finding that they had established standing and had proffered five admissible contentions in their Initial Petition to Intervene. See *South Texas*,

⁵ The Commission has previously discussed its policy on interlocutory review and the applicability of § 2.311 in this proceeding. See *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 & 4), CLI-09-18, 70 NRC __, __ (Sept. 23, 2009) (slip op. at 2-4). Specifically, the Commission pointed to its general policy of limited interlocutory review and stated that interlocutory review of a Board's ruling on contention admissibility is permitted in only two situations: 1) where an order wholly denies a petition for leave to intervene or 2) where an order grants a petition for leave to intervene but a party other than the petitioner argues that it should have been wholly denied. *Id.* at 3 & n.6 (citing *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998)).

LBP-09-21, 70 NRC __ (slip op.); *South Texas*, LBP-09-25, 70 NRC __ (slip op.). Accordingly, because Intervenors' Petition was granted, Intervenors do not have a right under § 2.311 to appeal the Board's decision to reject their Mitigative Strategies Contentions. See *Pilgrim*, CLI-07-02, 65 NRC at 11-12.

Further, Intervenors have failed to demonstrate that their Appeal meets the requirements of 10 C.F.R. § 2.341(f)(2). Under this regulation, interlocutory review "will be granted *only if the party demonstrates* that the issues for which the party seeks interlocutory review" meet the requirements of § 2.341(f)(2)(i) or (ii). 10 C.F.R. § 2.341(f)(2) (emphasis added). Here, Intervenors do not demonstrate that their Appeal meets these requirements nor do they even claim that this is the case. Further, as a general matter, the fact that some of the Intervenors' contentions were found inadmissible is not a basis for granting interlocutory review. See *Pilgrim*, CLI-07-02, 65 NRC at 12 (internal citation omitted) (stating that claims that a Board wrongly rejected a contention are common and cannot, without more, be said to affect a proceeding's structure). Accordingly, Intervenors' Appeal should be dismissed on procedural grounds for failure to meet the requirements of 10 C.F.R. §§ 2.311 or 2.341(f)(2).

II. The Board's Rulings Regarding Contentions MS-1, MS-3 and MS-6 Should Be Upheld.

A. The Board Correctly Determined That Contention MS-1 is Inadmissible.

1. Summary of the Board's Decision Regarding Contention MS-1

The Board did not commit legal error or abuse of discretion in ruling that MS-1 is inadmissible. MS-1, as proposed by Intervenors, states:

The submittal is deficient because it omits any reference to the numbers and magnitudes of the fires and explosions that would be expected, for example, from the impact of a large commercial airliner(s). Without such reference there is an inadequate basis to determine whether the proposed mitigative strategies are adequate to comply with 10 C.F.R. § 50.54(hh)(2). Compliance with 10 C.F.R. § 50.54(hh)(2) cannot be determined without a determination of the full spectrum of damage states. At a minimum, the Applicant should be required to describe damage footprints both quantitatively and qualitatively, including composite damage footprints, that are reasonably expected with an airstrike(s) and include descriptions of anticipated physical damage, shock damage, fire damage, fire spread, radiation exposures to emergency responders and the public and other

effects such as failure of structural steel. See draft regulatory guidance for the aircraft impact design regulation, 10 C.F.R. § 50.150, NEI 07-13, pp. 32-36.

Mitigative Strategies Contentions at 5-6.

The Board rejected MS-1 because it fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi). *South Texas*, LBP-10-02, 71 NRC at ___ (slip op. at 23). The Board reasoned that Intervenors “failed to provide a legal basis for obligating the Applicant to address ‘the full spectrum of damage states’ much less the impact of a large aircraft, in the Mitigative Strategies Report.” *Id.* The Board noted that Intervenors referenced NEI 06-12, NEI 07-13, and the Statement of Consideration (SOC) for the Power Reactor Security Requirements rulemaking to support MS-1. *Id.* at 19-20. However, the Board found that these references do not provide a legal basis to support Intervenors’ contention. See *id.* at 22. Accordingly, the Board ruled Contention MS-1 to be inadmissible. *Id.* at 23.

2. Intervenors’ Appeal Does Not Demonstrate an Error in the Board’s Decision.

On appeal, Intervenors repeat the arguments originally offered in support of Contention MS-1, claiming that the Applicant’s Mitigative Strategies Report is deficient because it fails to discuss the spectrum of damage states to which the mitigative strategies apply. Appeal at 5. Intervenors claim that in order to evaluate the effectiveness of mitigative strategies, an applicant must describe the spectrum of damage footprints quantitatively and qualitatively. *Id.* at 5-6. Intervenors recognize that 10 C.F.R. § 50.54(hh)(2) does not require an applicant to specify the numbers and magnitude of fires and explosions, but Intervenors argue that 1) the SOC for the 10 C.F.R. § 50.54(hh) rulemaking, 2) NEI 06-12, and 3) NEI 07-13 support their position. See *id.* at 6, 9, 11, 14-15.

a. Intervenors’ Appeal Does Not Demonstrate that the Board Erred in Ruling that the SOC for the Power Reactor Security Requirements Rulemaking Does Not Support Contention MS-1.

Intervenors claim that a discussion of the magnitude of fires and explosions and the spectrum of damage states is required not by the Commission’s regulation, but by language in

the SOC for the Power Reactor Security Requirements rulemaking regarding 10 C.F.R. § 50.54(hh)(2). *Id.* at 6 & n.13 (quoting 74 Fed. Reg. at 13,958). Intervenors argue that the SOC requires consideration of the magnitude of fires and explosions because it uses the adjective “large” and requires consideration of the spectrum of damage states because it “requir[es] that the mitigative strategies be ‘effective.’” *Id.* at 6. Intervenors claim that the Commission cannot determine whether the mitigative strategies are effective absent a description in quantitative and/or qualitative terms of the spectrum of damage states. *Id.* at 10. In addition, Intervenors assert, referencing statements in the SOC regarding § 50.54(hh)(1) and (2), that an applicant’s mitigative strategies must “consider aircraft attacks as an example for determining the scale of fires/explosions that would be assumed to occur” *Id.* at 6 & n.14 (citing 74 Fed. Reg. at 13,927-928, 13,958).

The Board, however, correctly found that Intervenors failed to provide a legal basis to support their assertion that a description of the spectrum of damage states is required in order to determine effectiveness. *South Texas*, LBP-10-02, 71 NRC at ___ (slip op. at 22). The Board properly reasoned that “Intervenors improperly rely on [the SOC] language to claim that effectiveness of mitigative strategies cannot be judged without an enumeration of damage states.” *Id.*⁶ The Board further reasoned that provisions in the SOC regarding 10 C.F.R. § 50.54(hh)(1) that Intervenors’ rely on to support their interpretation of

⁶ Similarly, Intervenors claim that while “large” is used in § 50.54(hh)(2), it is not defined in NEI 06-12 or the Applicant’s Mitigative Strategies Report. Appeal at 12 n.36. Intervenors argue that “[b]ecause there’s no definition of what they mean by ‘large,’ there is no way to determine whether the mitigative measures will be ‘effective’” and “[n]ot inferring a criterion that the mitigative strategies in question be effective would create an ‘unreasonable and irrational loophole’ that is contrary to ‘common sense’ and undermines the underlying purpose that ‘licensees will be able to implement effective mitigative measures.’” *Id.* (internal citation omitted). The Board did not, however, rule that the mitigative measures do not have to be effective; rather the Board found that Intervenors did not provide a regulatory basis to support their assertion that effectiveness can only be judged by enumerating damage states. See *South Texas*, LBP-10-02, 71 NRC at ___ (slip op. at 22). Intervenors fail to identify an error in the Board’s conclusion. See *Millstone*, CLI-04-36, 60 NRC at 639 n.25.

§ 50.54(hh)(2), are “not meant to be used to interpret 10 C.F.R. § 50.54(hh)(2),” and therefore do not support Intervenors’ position. See *id.*

Section 50.54(hh)(2) states:

(2) Each licensee shall develop and implement guidance and strategies intended to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities under the circumstances associated with loss of large areas of the plant due to explosions or fire, to include strategies in the following areas:

- (i) Fire fighting;
- (ii) Operations to mitigate fuel damage; and
- (iii) Actions to minimize radiological release.

As the Commission stated, “50.54(hh)(2) requires licensees to develop guidance and strategies for addressing the loss of large areas of the plant due to explosions or fires from a beyond-design basis event,” and that “[t]he rule contemplates that the initiating event for such large fires and explosions could be any number of beyond-design basis events,” of which a large aircraft impact is only one example. 74 Fed. Reg. 13,926, 13,957 (Mar. 27, 2009). The Board correctly ruled that the SOC does not demonstrate that in order to determine effectiveness, an applicant is required to identify specific events let alone the spectrum of damage states in its Mitigative Strategies Report. See *South Texas*, LBP-10-02, 71 NRC at ___ (slip op. at 22). This is further demonstrated by the fact that, as the Board properly recognized, “(c)urrent reactor licensees have already developed and implemented procedures that comply with the 50.54(hh)(2) requirements,’ *without considering the full spectrum of damages states . . .*” *Id.*

(slip op. at 22 n.98) (quoting 74 Fed. Reg. at 13,957) (emphasis added).⁷

⁷ Intervenors repeat their previous argument claiming that absent baseline assumptions regarding the number and magnitude of fires and explosions, the Commission cannot determine compliance with its regulatory requirements and acceptance of the Applicant’s strategies “would be arbitrary and contrary to the requirements of the AEA, 42 U.S.C. § 2133(d).” *Compare* Appeal at 10, 13 with Mitigative Strategies Contention at 13 and Response at 7-8. However, as the Board properly found, the Intervenors fail to provide a regulatory basis to support their assertion that applicants are required to (continued. . .)

Intervenors do not identify any errors in the Board's reasoning that the SOC does not provide a legal basis to support their argument that the Applicant must perform an analysis of the spectrum of damage states; rather, Intervenors simply repeat their previous arguments. *Compare Appeal at 6 with Mitigative Strategies Contentions at 6-7 and Response at 7, 9.* Thus, Intervenors have failed to fulfill their "responsibility of clearly identifying the errors in the decision below" See *Millstone*, CLI-04-36, 60 NRC at 639 n.25 (quoting *Advanced Medical Systems*, CLI-94-6, 39 NRC at 297).

b. Intervenors' Appeal Does Not Demonstrate that the Board Erred in Ruling that NEI 06-12 Does Not Support Contention MS-1.

Intervenors argue that the Applicant's Mitigative Strategies Report is inadequate because it relies on the guidance in NEI 06-12, which "concedes that it does not consider the scale of any potential fire or explosion and instead adopts a 'flexible response' for meeting undefined and unquantified 'extreme conditions.'" Appeal at 8 (quoting NEI 06-12, Rev. 2. at 1). Intervenors argue that because the scale of potential fires and explosions is not considered, it is impossible to determine whether the Applicant's strategies are adequate. See *id.* Intervenors assert that NEI 06-12's failure to discuss the spectrum of damage states is inconsistent with the requirements of § 50.54(hh)(2) which "specifies that mitigative strategies must be effective and consistent with the loss of large areas of a nuclear plant." *Id.* at 15. In addition, Intervenors claim that the Commission recognized that NEI 06-12 is not adequate for new reactors and that the Commission's endorsement of NEI 06-12 "is not conclusive on the question of whether it is an acceptable means" for new reactors to address § 50.54(hh)(2). *Id.* at 14-15.

(. . .continued)

assess impacts of large aircraft and/or the scale and magnitude of other damage states in order to determine effectiveness. See *South Texas*, LBP-10-02, 71 NRC at ___ (slip op. at 22). Intervenors do not point to an error of law or abuse of discretion in this analysis. See *Oyster Creek*, CLI-06-24, 64 NRC at 121.

The Board, however, properly ruled that the “high level insights” of NEI-06-12, *i.e.*, the language quoted by Intervenors (*see* Appeal at 8 n.21 (quoting NEI 06-12 Rev. 2 at 1)), do not support Intervenors’ position. *South Texas*, LBP-10-02, 71 NRC at ___ (slip op. at 22). The Board noted that the insights relied on by Intervenors are included in the introduction section of NEI 06-12 and not in the sections that provide guidance to applicants regarding information to include in mitigative strategies reports. *Id.* On Appeal, Intervenors argue that these statements are noteworthy regardless of where they are discussed. Appeal at 14 n.42. Whether or not these statements are “noteworthy,” Intervenors overlook the fact that the Commission endorsed NEI 06-12 with the “high level insights” in the introduction.⁸ This introduction states, among other things, that it is impossible to predict precise damages states and that the “[i]dentified response capabilities will not ensure success under the full spectrum of potential damage states.” *See* NEI 06-12, Rev. 2, at 1. In the SOC, the Commission stated that NEI 06-12, Revision 2, and the Commission “issued guidance (Safeguards Information) to current reactor licensees on February 25, 2005 . . . provide an acceptable means for developing and implementing the mitigative strategies.” 74 Fed. Reg. at 13,958. Thus, like the SOC, the Board correctly determined that NEI 06-12 does not support Intervenors’ assertion that an applicant is required to assess the spectrum of damage states. Intervenors do not identify an error in the Board’s ruling that these “high level insights” do not support Intervenors’ position. *See South Texas*, LBP-10-02, 71 NRC at ___ (slip op. at 22).

Intervenors are, however, correct in noting that the Commission stated that it is developing guidance to consolidate the previously issued and endorsed guidance and to address new reactor designs. Appeal at 14 (citing 74 Fed. Reg. at 13,958). This statement

⁸ The Commission “endorsed NEI 06-12 Revision 2, by letter dated December 22, 2006” 74 Fed. Reg. at 13,958.

does not, however, support Intervenor's interpretation of the § 50.54(hh)(2) requirements. The Commission stated that "[n]ew reactor licensees are required to employ the same strategies as current reactor licensees to address core cooling, spent fuel pool cooling, and containment cooling, and containment integrity"; however unlike operating reactors, new reactors must also account for specific plant design features, as appropriate. 74 Fed. Reg. at 13,957. Therefore, while new reactor strategies may not be identical to operating reactor strategies due to design features and changes, the Commission nonetheless stated that new reactors are required to use the same or similar strategies as operating reactors. See *id.* As the Board indicated, NEI 06-12 was used in conjunction with current operating reactors' mitigative strategies and these mitigative strategies do not consider a full spectrum of damage states. See *South Texas*, LBP-10-02, 71 NRC at ___ (slip op. at 22 n.98). As the Commission stated, these "[c]urrent reactor licensees have already developed and implemented procedures that comply with § 50.54(hh)(2) requirements and do not require any additional action to comply with these rule provisions." 74 Fed. Reg. at 13,957. Thus, consistent with the Commission's recognition that current operating licensees have complied with the § 50.54(hh)(2) procedures, the Board correctly found that Intervenor's assertions regarding NEI 06-12 do not support admission of Contention MS-1. See *South Texas*, LBP-10-02, 71 NRC at ___ (slip op. at 22-23). Intervenor does not point to any errors in the Board's analysis nor do they provide any information to suggest that the Board committed an error of law or abuse of discretion by ruling that NEI 06-12 does not support the admissibility of Contention MS-1. See *Oyster Creek*, CLI-06-24, 64 NRC at 121 (citing *USEC*, CLI-06-09, 63 NRC at 439 n.32).

c. Intervenor's Appeal Does Not Demonstrate that the Board Erred in Ruling that NEI 07-13 Does Not Support Contention MS-1.

Intervenor suggests that because descriptions of the effects of aircraft impacts are included in other contexts, the Applicant should consider specific damage states in its Mitigative Strategies Report. See Appeal at 11. Specifically, Intervenor refers to NEI 07-13, which is draft

regulatory guidance for the regulation requiring consideration of aircraft impacts for new nuclear power reactors (10 C.F.R. § 50.150). See *id.* at 8; *South Texas*, LBP-10-02, 71 NRC at ___ (slip op. at 22).⁹ As the Board correctly noted, NEI 07-13, which has not been endorsed by the Commission, was created as guidance for an entirely separate regulation and does not support Intervenor's interpretation of § 50.54(hh)(2). See *South Texas*, LBP-10-02, 71 NRC at ___ (slip op. at 19-20, 22). Again, Intervenor's have not pointed to any errors in the Board's analysis, but instead have simply repeated their previous arguments claiming that the Applicant erred. Compare Appeal at 9, 11 with Mitigative Strategies Contentions at 11-12 & Response at 4-5.

In summary, as illustrated above, the Board correctly ruled that Intervenor's reliance on the SOC for the Power Reactor Security Requirements rulemaking, NEI 06-12, and NEI 07-13 is misplaced. See *South Texas*, LBP-10-02, 71 NRC at ___ (slip op. at 22). Therefore, the Board properly found that the Intervenor's failed to provide a regulatory basis to support their assertion that the Applicant is required to discuss the spectrum of damage states in its Mitigative Strategies Report. *Id.* at 23. Intervenor's have not shown that the Board's analysis is flawed nor have they shown that the Board's conclusion constitutes an error of law or abuse of discretion. See *Oyster Creek*, CLI-06-24, 64 NRC at 121 (citing *USEC*, CLI-06-09, 63 NRC at 439 n.32). Accordingly, the Board's ruling that MS-1 is inadmissible because it fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi) should be upheld.

⁹ Intervenor's also claim that the "Applicant's assertion and the Board's conclusion that requiring a specification of the spectrum of damage states to establish effectiveness of the mitigative strategies would render the aircraft design rule unnecessary and redundant is mistaken." Appeal at 11. Although the Applicant made this argument (Applicant Answer at 15), the Board did not reach this conclusion in its decision regarding the admissibility of MS-1. See *South Texas*, LBP-10-02, 71 NRC at ___ (slip op. at 19-23). Accordingly, Intervenor's assertion does not point to an error in the Board's Order.

B. The Board Correctly Determined That Contention MS-3 is Inadmissible.

1. Summary of the Board's Decision Regarding Contention MS-3

The Board did not commit legal error or abuse of discretion in denying Contention MS-3.

Intervenors stated Contention MS-3 as follows:

The STP 3&4 Mitigative Strategies Table includes a commitment to evaluate existing dose projection models to determine whether such are adequate "under the conditions envisioned for this event." MST p.37. However, there is no quantitative or qualitative description of the "event" nor is there a stated commitment to evaluate the dose projection models considering the full spectrum of damage states.

Mitigative Strategies Contentions at 15. The Board ruled that Contention MS-3 did not satisfy either 10 C.F.R. § 2.309(f)(1)(v) or (vi) because the Intervenors failed to provide a factual or legal basis for their contention. *South Texas Project*, LBP-10-02, 71 NRC at __ (slip op. at 26). In concluding that § 2.309(f)(1)(vi) was not met, the Board concluded that no requirement to minimize dose is found in 10 C.F.R. §§ 50.54(hh)(2) or 52.80(d) and that 10 C.F.R. § 50.54(hh)(2) does not require that the Mitigative Strategies Report contain a dose projection model or a quantitative radiation impact study. *Id.* The Board determined that the declaration from Intervenors' expert did not satisfy 10 C.F.R. § 2.309(f)(1)(v) because it did not contain "any factual explanation as to why dose projection model evaluations or other radiation studies are required during this part of the COLA process." *Id.*

2. The Board Properly Rejected Contention MS-3.

In their Appeal, the Intervenors incorporate their arguments and authorities related to Contention MS-1 and claim that Contention MS-3 is based on the Applicant's failure to take damage states from a Loss of Large Areas (LOLA) event into account in the context of radiation dose projections. Appeal at 16. The Intervenors also assert that the Applicant cannot demonstrate that its plan for mitigating LOLA events can be executed without subjecting responders to excessive radiation exposure absent the inclusion of an "appropriately detailed

and accurate model based on the spectrum of damage states to which the mitigative strategies apply." *Id.* at 16.

The Intervenor's arguments, however, do not demonstrate that the Board abused its discretion or committed legal error in denying Contention MS-3. Contrary to Commission case law, the Intervenor has not satisfied their burden of clearly identifying the alleged errors in the Board's decision. See *Millstone*, CLI-04-36, 60 NRC at 639 n.25. Beyond incorporating their Contention MS-1 arguments and stating that Contention MS-3 is based on the Applicant's failure to account for damage states, the Intervenor simply repeat arguments made in their original submission. Compare Appeal at 16 with Mitigative Strategies Contentions at 15. The Intervenor's arguments do not address the Board's reasons for concluding that Contention MS-3 does not provide the necessary legal or factual basis, much less explain why the Board's reasoning is incorrect. Instead, the Intervenor present "general arguments" that fail to "come to grips with the Board's reasons" for denying the contention. See *Millstone*, CLI-04-36, 60 NRC at 639.

Specifically, the Intervenor's fail to controvert the Board's determination (1) that neither 10 C.F.R. §§ 50.54(hh)(2) nor 52.80(d) require the minimization of dose and (2) that 10 C.F.R. § 50.54(hh)(2) does not require a dose projection model or a quantitative radiation impact study in the Mitigative Strategies Report. See *South Texas Project*, LBP-10-02, 71 NRC at ___ (slip op. at 26). The Appeal also does not explain why the Board was wrong to conclude that the Intervenor's expert declaration lacked a factual explanation for why "dose projection model evaluations or other radiation studies" are required at this stage in the process. See *id.* The Board correctly determined that Contention MS-3 fails to meet 10 C.F.R. § 2.309(f)(1)(v) because insufficiently supported expert assertions do not serve as a foundation for contention admissibility. See *South Carolina Electric & Gas Co. & South Carolina Public Service Authority (Also Referred to as Santee Cooper)* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-01, 71 NRC ___, ___ (Jan. 7, 2010) (slip op. at 22 n.84) (agreeing with the

Board that sufficient information to establish a genuine dispute with the applicant was not provided by an expert who used statistical and anecdotal references to the economic downturn rather than quantifying the need for power or specifically challenging the applicant's analysis). See also *USEC, Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 472 (2006) (internal citations omitted) ("An expert opinion that merely states a conclusion (e.g., the application is 'deficient,' 'inadequate,' or 'wrong') without providing a reasoned basis or explanation for that conclusion is inadequate . . ."). As the Staff explained in its Answer, Contention MS-3 contains vague, conclusory assertions, and the Intervenor's expert declaration does not explain why the allegedly missing information is required or provide a reasoned basis for the expert's conclusions. See Staff Answer at 17-18.

On Appeal, the Intervenor also incorporate by reference their Contention MS-1 arguments regarding their claim that the Applicant is required to evaluate the damage states from a LOLA event. Appeal at 6. Although the Board did not address this issue in the context of Contention MS-3, the Board did address the Intervenor's Contention MS-1 assertions in its ruling on that contention. As explained in the Board's ruling on Contention MS-1, *South Texas Project*, LBP-10-02, 71 NRC at ___ (slip op. at 18-23), and the discussion of that ruling in this brief, *supra*, the Intervenor did not provide a regulatory basis to support their assertion that the spectrum of damage states must be discussed in the Mitigative Strategies Report. Therefore, Contention MS-3 is also inadmissible to the extent that it relies on the theories espoused in Contention MS-1.

As explained above, the Intervenor has not met their burden of demonstrating legal error or abuse of discretion on the part of the Board. The Appeal presents only general arguments that do not specifically controvert the Board's reasons for denying the contention. See *Millstone*, CLI-04-36, 60 NRC at 639 & n.25. In addition, Contention MS-3 is inadmissible to the extent that it is based on the arguments made in Contention MS-1. The Board correctly concluded that Contention MS-3 was inadmissible, and the Board's ruling should be upheld.

C. The Board Correctly Determined That Contention MS-6 is Inadmissible.

1. Summary of the Board's Decision Regarding Contention MS-6.

The Board did not commit legal error or abuse of discretion in denying Contention MS-6.

Intervenors stated Contention MS-6 as follows:

The South Texas Project 3&4 Mitigative Strategies Report is deficient because it does not address strategies suitable for the particular circumstances associated with LOLAs occurring during reactor outages. Therefore, it does not comply with the requirements of 10 C.F.R. §50.54(hh)(2), which applies both during full-power operation and during outages.

Mitigative Strategies Contentions at 19. The Intervenors claim that to comply with 10 C.F.R. § 50.54(hh)(2), the Mitigative Strategies Report "must consider the circumstances during an outage and evaluate how the mitigative strategies for full-power operation may have to be modified to be effective during outages." *Id.* at 20. The Board ruled that Contention MS-6 did not satisfy either 10 C.F.R. § 2.309(f)(1)(v) or (vi) because the Intervenors failed to provide factual or regulatory support for their assertion that the Mitigative Strategies Report must evaluate LOLA events during reactor outages. *South Texas Project*, LBP-10-02, 71 NRC at ___ (slip op. at 31).

2. The Board Properly Rejected Contention MS-6.

On appeal, the Intervenors claim that there are many differences between full power operation and outages that "that *may* have a significant impact on the effective implementation of LOLA mitigative strategies." Appeal at 17 (emphasis added). The Intervenors then outline some of these asserted differences. *Id.* The Intervenors also take issue with language in NEI 06-12, Revision 2, which states that "there is no need to consider the potential for equipment to be out of service for routine maintenance activities" and that "prior to the event, the plant systems are assumed to be in a nominal configuration with the reactor at 100% power." *Id.* (quoting NEI 06-12, Rev. 2, pp. 10-11). The Intervenors claim that these statements are "arbitrary" because 10 C.F.R. § 50.54(hh)(2) does not only apply at full power.

Id. Finally, the Intervenor's assert that "the mitigative strategies are not conservative related to outages." *Id.*

The arguments presented on appeal are largely a recitation of the arguments originally offered in support of Contention MS-6. *Compare* Appeal at 17-18 *with* Mitigative Strategies Contentions at 19-20. The Intervenor's do not explain how Contention MS-6 satisfies 10 C.F.R. § 2.309(f)(1)(v) and (vi), nor do they show that the Board abused its discretion or committed legal error in denying Contention MS-6. Although the Intervenor's are correct that 10 C.F.R. § 50.54(hh)(2) applies during outages as well as during full power operation, the language in § 50.54(hh)(2) does not differentiate between outages and operations. The Intervenor's failed to identify a legal requirement that the Mitigative Strategies Report must specifically discuss LOLA events during outages.

The Board also correctly concluded that the Intervenor's did not provide factual support for their assertion that the Mitigative Strategies Report must discuss outages. Although the Intervenor's assert several differences between conditions during outages and conditions during full power operation, neither the contention nor the Intervenor's' expert declaration explained how the mitigative strategies in the Mitigative Strategies Report would become ineffective during outages. The Intervenor's also claim that NEI 06-12 contains "arbitrary restrictions" and that the mitigative strategies are not conservative, but these bare assertions do not support contention admissibility. See *USEC*, CLI-06-10, 63 NRC at 472 (concluding that an expert opinion is inadequate if it merely states a conclusion "without providing a reasoned basis or explanation for that conclusion"); *V.C. Sumner*, CLI-10-01, 71 NRC at ___ (slip op. at 22 n.84) (finding an expert's declaration inadequate because it "neither quantified the need for power nor provided any analysis to challenge that supplied by the" applicant).

The Board correctly determined that Contention MS-6 does not meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi). The Intervenor's have not demonstrated a

legal error or an abuse of discretion on the part of the Board, and the Board's ruling should be upheld.

CONCLUSION

The Intervenors' Appeal does not meet the requirements of 10 C.F.R. §§ 2.311 or 2.341(f)(2), and accordingly, should be denied. Further, the Appeal should be denied because Intervenors do not identify any legal error or abuse of discretion in the Board's contention admissibility determinations. Therefore, the Board's determinations regarding contention admissibility in LBP-10-02 should be affirmed.

Respectfully submitted,

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/Executed in accord with 10 CFR § 2.304(d)/

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Dated at Rockville, Maryland
this 19th day of February 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
)
STP NUCLEAR OPERATING COMPANY) Docket Nos. 52-012 & 52-013
)
)
(South Texas Project, Units 3 & 4))

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC Staff's Brief In Opposition to Intervenors' Appeal of LBP-10-02" have been served upon the following persons by Electronic Information Exchange this 19th day of February 2010:

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