~~CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION~~
~~WITHHOLD PER 10 C.F.R. § 2.390 AND JULY 1, 2009 PROTECTIVE ORDER~~

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket Nos. 52-012-COL
	)	52-013-COL
STP NUCLEAR OPERATING COMPANY	)	
	)	
(South Texas Project Units 3 and 4)	)	February 19, 2010

STP NUCLEAR OPERATING COMPANY'S BRIEF OPPOSING INTERVENORS' APPEAL OF LBP-10-02

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I. INTRODUCTION

In accordance with 10 C.F.R. § 2.311(b), STP Nuclear Operating Company ("STPNOC"), applicant in the above-captioned proceeding, hereby submits this Brief opposing "Intervenor's [sic] Appeal of Atomic Safety and Licensing Board's Order of January 29, 2010" ("Appeal").[1]

In the Appeal, Intervenors[2] seek to have the Commission reverse the Atomic Safety and Licensing Board's ("Board") denial, in LBP-10-02,[3] of three late-filed contentions related to the adequacy of a report filed by STPNOC on May 26, 2009 with the U.S. Nuclear Regulatory Commission ("NRC" or "Commission"), entitled "South Texas Project Units 3 & 4 Mitigative

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1 Intervenors filed their Appeal "[p]ursuant to 10 C.F.R. § 2.311(a)." Notice of Appeal at 1 (Feb. 9, 2010).

2 "Intervenors" are the Sustainable Energy and Economic Development Coalition, the South Texas Association for Responsible Energy, Public Citizen, Susan Dancer, Daniel A. Hickl, and Bill Wagner.

3 *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 & 4), LBP-10-02, slip op. (Jan. 29, 2010) ("LBP-10-02"). The discussions of Intervenors' contentions have been redacted from the publicly available version of the decision. *Id.* at 18. All references herein to LBP-10-02 are to the unredacted, sensitive unclassified non-safeguards information ("SUNSI") version.

Strategies Report 10 CFR 52.80(d)" ("Mitigative Strategies Report").[4] The contentions claimed that the Mitigative Strategies Report is insufficient to satisfy the requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2), which specify requirements for dealing with loss of large areas ("LOLA") of the plant due to fires or explosions. LBP-10-02 rejected all seven of Intervenors' LOLA contentions (MS-1 through MS-7),[5] but Intervenors have appealed only three: MS-1 ("Damage States"), MS-3 ("Dose Assessment"), and MS-6 ("Reactor Outages").

As demonstrated below, this interlocutory appeal is premature and impermissible under 10 C.F.R. §§ 2.311 and 2.341. Indeed, the Commission has reiterated this principle during the course of this proceeding, so Intervenors should have been well-aware that their Appeal was unauthorized.[6] Even if the substance of the Appeal is considered, it merely repeats arguments raised in pleadings before the Board and does not attempt to show that the Board's decisions were reversible errors. Finally, the Board's ruling was clearly correct. Therefore, if the Commission were to decide to address the merits of the appeal, the Commission should affirm the ruling of the Board. For each of these reasons, this Appeal should be denied.

II. PROCEDURAL BACKGROUND

In LBP-09-21[7] and LBP-09-25,[8] the Board admitted a total of five contentions on water quality and other issues unrelated to LOLA. Litigation continues on all five contentions. As

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4 *See* Letter from S. Head, STPNOC, to NRC Document Control Desk, "Submittal of Mitigative Strategies Report – 10 CFR 52.80(d)" (May 26, 2009), *available at* ADAMS Accession No. ML091470723 ("May 26, 2009 Letter"). The report itself, dated May 26, 2009, is not publicly available because it contains SUNSI.

5 LBP-10-02, slip op. at 2.

6 *See South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 & 4), CLI-09-18, slip op. at 4-5 (Sept. 23, 2009).

7 *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 & 4), LBP-09-21, slip op. (Aug. 27, 2009).

8 *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 & 4), LBP-09-25, slip op. (Sept. 29, 2009).

noted above, Intervenors later proffered seven additional LOLA contentions.[9] The contentions on appeal raised the following allegations under the LOLA regulations:

- MS-1: the Mitigative Strategies Report improperly relies upon NEI-06-12, Rev. 2, and thereby omits discussion of "damage states," including potential numbers and magnitudes of fires and explosions.[10]
- MS-3: the Mitigative Strategies Report lacks a required commitment to "evaluate the dose projection models considering the full spectrum of damage states."[11]
- MS-6: the Mitigative Strategies Report "does not address strategies suitable for the particular circumstances associated with LOLAs occurring during reactor outages."[12]

As also noted above, in LBP-10-02, the Board denied all of the LOLA contentions as inadmissible under 10 C.F.R. § 2.309(f)(1). In particular, the Board denied Contention MS-1 because it did not identify any legal basis for requiring STPNOC to evaluate a full spectrum of damage states, and denied both MS-3 and MS-6 for failure to provide a sufficient legal or factual basis for the contentions. Intervenors impermissibly now seek interlocutory review of the admissibility of those three contentions.

III. LEGAL STANDARDS

Appeals from interlocutory Board rulings are available only in specified circumstances. As its title states, 10 C.F.R. § 2.311 is reserved for "interlocutory review of rulings on requests for hearing/petitions to intervene, selection of hearing procedures, and requests by potential parties for access to sensitive unclassified non-safeguards information and safeguards information." In relevant part, this regulation states:

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9 "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) ("Contentions").

10 *See* LBP-10-02, slip op. at 18-19.

11 *Id.* at 25.

12 *Id.* at 30.

> (a) An order of the presiding officer . . . may be appealed to the Commission with respect to: (1) A request for hearing; (2) A petition to intervene . . . .
>
> (b) These appeals must be made as specified by the provisions of this section, within ten (10) days after the service of the order. . . . *No other appeals from rulings on requests for hearing are allowed.*
>
> (c) *An order denying a petition to intervene, and/or request for hearing . . . is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted.*[13]

Challenges to Board rulings on late-filed contentions do not fall under 10 C.F.R. § 2.311, but under Section 2.341.[14] Intervenors do not rely on Section 2.341. This is, however, the only regulation under which their Appeal might lie.[15]

Under Section 2.341, the Commission has the "discretion to grant interlocutory review at the request of a party in limited circumstances. However, [t]he Commission's longstanding general policy disfavors interlocutory review."[16] This is "largely due to [the Commission's] general unwillingness to engage in 'piecemeal interference in ongoing Licensing Board proceedings.'"[17] In the absence of a Board certifying or referring an issue to the Commission:

> [A] petition for interlocutory review will be granted *only* if the party demonstrates that the issue for which the party seeks interlocutory review:
>
> (i) Threatens the party adversely affected by it with *immediate and serious irreparable impact* which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or

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[13] 10 C.F.R. § 2.311 (emphasis added). LBP-10-02 included a ruling on Intervenors request for access to SUNSI. The Board's reference to Section 2.311 in LBP-10-02 appears to relate to this aspect of the decision. *See* LBP-10-02, slip op. at 33. Intervenors' additional SUNSI request, however, is not the subject of their Appeal.

[14] *See South Texas Project*, CLI-09-18, slip op. at 4-5.

[15] *See AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 126 (2006) (citations omitted).

[16] *Id.* at 119 (citations omitted).

[17] *Exelon Generation Co.* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 466 (2004) (*quoting Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 207, 213 (2002)).

(ii) Affects the *basic structure* of the proceeding in a *pervasive or unusual manner*.[18]

The Commission will "grant review under the 'pervasive and unusual' effect standard 'only in extraordinary circumstances.'"[19]

Even if the Commission were to take review under 10 C.F.R. § 2.341(f)(2), the Board's decisions on contention admissibility are entitled to "substantial deference,"[20] and are only subject to reversal for clear error or abuse of discretion.[21]

IV. THE INTERVENORS' APPEAL SHOULD BE REJECTED

A. The Board's Rejection of Intervenors' Contentions Is Not Subject to Appeal at this Time

Although Intervenors' Appeal relies upon 10 C.F.R. § 2.311, this regulation does not permit the appeal of the late-filed contentions denied by the Board. For example, in CLI-06-24, the Commission rejected a similar appeal in the recently concluded license renewal proceeding for the Oyster Creek plant. In *Oyster Creek*, the intervenors already had one admitted contention, and had submitted a motion to "supplement the basis" of the admitted contention, or, in the alternative, add two new late-filed contentions.[22] The Board rejected the motion, and the intervenors appealed, seeking interlocutory review and citing 10 C.F.R. §§ 2.311 and 2.341.[23] The Commission first rejected intervenors' appeal under Section 2.311:

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18 10 C.F.R. § 2.341(f)(2) (emphasis added).

19 *Oyster Creek*, CLI-06-24, 64 NRC at 119.

20 *Id.* at 121 (*citing Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-855, 24 NRC 792, 795 (1986)).

21 *See S.C. Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 & 3), CLI-10-01, slip op. at 5-6 & n.24 (Jan. 7, 2010); *Progress Energy Fla., Inc* (Combined License Application, Levy County Nuclear Power Plant, Units 1 & 2), CLI-10-02, slip op. at 2 (Jan. 7, 2010).

22 CLI-06-24, 64 NRC at 115-16.

23 *See id.* at 125. The *Oyster Creek* intervenors also sought reconsideration from the Board simultaneously with their appeal. The Board rejected the request for reconsideration prior to CLI-06-24. *Id.*

> [S]ection 2.311 is not applicable to the Board's refusal to supplement the basis of Citizens' contention or to add new contentions because the section applies only where a board decision rules on a request for hearing, petition to intervene, or selection of hearing procedures. It does not authorize appeals from an order like LBP-06-11 refusing to supplement an admitted contention.[24]

Intervenors make the same request here. But as explained in *Oyster Creek*, such relief is unavailable under Section 2.311.

Intervenors here do not cite 10 C.F.R. § 2.341(f), which is the only regulation that "conceivably" permits the appeal of interlocutory decisions such as the admissibility of late-filed contentions in an ongoing proceeding.[25] As noted above, this regulation permits interlocutory appeals if the appellant can show either a serious and irreparable impact on itself or a pervasive or unusual effect on the basic structure of the proceeding.[26] Like the *Oyster Creek* intervenors, however, Intervenors here have not asserted such harms, "[n]or is it obvious how [Intervenors] could make such a showing, since [they have] already successfully intervened in the proceeding."[27] As the Commission ruled in *Oyster Creek*, the mere denial of a contention does not constitute a pervasive effect on a proceeding.[28]

Intervenors, moreover, should have been well aware of this aspect of the Commission's Rules of Practice, because the Commission has already reiterated it in an Order in this proceeding, issued only four months ago. CLI-09-18 provides a detailed analysis of 10 C.F.R.

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[24] *Id.* Intervenors' Notice of Appeal cites 10 C.F.R. § 2.341(c)(2), a provision that is referenced in Section 2.311(b) and that prescribes the format and contents of a brief on review. Section 2.341(c)(2) does not provide any substantive basis for interlocutory review.

[25] *Oyster Creek*, CLI-06-24, 64 NRC at 125-26.

[26] *See id.* at 126.

[27] *Id.* (*citing Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation) CLI-01-1, 53 NRC 1, 5 (2001)).

[28] *Id.*

§ 2.311.[29] In the course of its discussion, the Commission noted: "[a]s a general matter, contentions filed after the initial petition are not subject to appeal pursuant to section 2.311. Rather, challenges to Board rulings on late-filed contentions normally fall under our rules for interlocutory review."[30]

Therefore, the Appeal should be denied because there is no opportunity for review under Section 2.311. Even if the Appeal were to be considered under Section 2.341—a regulation that Intervenors do not rely upon—it still should be rejected because the Board's ruling does not have a pervasive or unusual impact on this proceeding.

B. Intervenors' Appeal Merely Repeats Arguments Raised Before the Board Rather than Challenging the Board's Decision

For the most part, Intervenors' Appeal merely cuts and pastes lightly edited versions of the text of their original Contentions or their Reply.[31] For example, essentially *all* of Intervenors' appeal argument regarding MS-1, MS-3, and MS-6 is either an exact or slightly modified or rearranged copy of text submitted to the Board.[32] The Appeal adds footnotes identifying the regulatory basis for the Board's rulings,[33] but offers no analysis of the applicable regulatory standards or of the Board's decision in LBP-10-02.

None of Intervenors' "argument" demonstrates that the Board made any clear error or abused its discretion. As the Commission ruled in rejecting a petition for review of a Board's

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29 *See generally South Texas Project*, CLI-09-18, slip op.

30 *Id.* at 4-5 (*citing Oyster Creek*, CLI-06-24, 64 NRC at 111).

31 "Intervenors' Consolidated Response to the Answers of Applicant and NRC Staff to the Intervenors' Contentions Regarding Applicant's Submittal Under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2)" (Sept. 15, 2009) ("Reply").

32 *Compare* Appeal at 5-10 *with* Contentions at 6-8 & 11-14; Appeal at 6 ("Notwithstanding this explicit example . . . ."), 10-15 *with* Reply at 4-14; Appeal at 16 *with* Contentions at 15 and Reply at 16; & Appeal at 17 *with* Contentions at 20.

33 Appeal at 5 n.10, 16 n.48, & 17 n.51.

denial of an intervention petition in another proceeding, when filings on appeal largely restate diffuse and generalized claims made before a Board, there is no reason for the Commission to set aside the ruling below.[34] Accordingly, Intervenors' Appeal should be rejected for failure to identify any error or abuse of discretion in the Board's decision.

C. The Board Was Correct in Ruling that Intervenors' Contentions Were Inadmissible

1. Background

Contentions MS-1, MS-3 and MS-6 are all related to the Mitigative Strategies Report, which STPNOC submitted to comply with 10 C.F.R. § 52.80(d). Section 52.80(d), which was adopted on March 27, 2009, stems from security orders issued by the NRC to operating reactors following the terrorist attacks on September 11, 2001.[35] In particular, Section 52.80(d) stems from interim compensatory measure "B.5.b" of Commission Order EA-02-026, Order for Interim Safeguards and Security Compensatory Measures, dated February 25, 2002, which imposed requirements regarding mitigating measures for large fires and explosions.[36] Section 52.80(d) states that a COLA must include:

> A description and plans for implementation of the guidance and strategies intended to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities under the circumstances associated with the loss of large areas of the plant due to explosions or fire as required by § 50.54(hh)(2) of this chapter.

In turn, Section 50.54(hh)(2), which also was adopted on March 27, 2009, states that:

> 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:

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34 *Summer*, CLI-10-01, slip op. at 5-6.

35 Power Reactor Security Requirements, 74 Fed. Reg. 13,926 (Mar. 27, 2009) ("Final Security Rule").

36 *Id.* at 13,928.

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

In its letter transmitting the Mitigative Strategies Report to the NRC, STPNOC stated that the report was prepared using the guidance of NEI 06-12, "B.5.b Phase 2 and 3 Submittal Guideline," Rev. 2.[37] This was consistent with the Statement of Considerations ("SOC") accompanying the adoption of Sections 52.80(d) and 50.54(hh)(2), which stated that the Commission had endorsed NEI 06-12, Revision 2, and that it provides an acceptable means for implementing the rule.[38] Of importance, NEI 06-12 does not state that mitigative strategies reports need to calculate damage footprints or address a full spectrum of damage states. Instead, NEI 06-12 states that applicants and licensees should develop a "flexible response capability."[39] As is explained throughout NEI 06-12, this flexible response capability is based upon the principles of diversity of mitigative systems and separation of mitigative equipment from the target areas. Through the implementation of such principles, strategies developed in accordance with NEI 06-12 are able to mitigate a myriad of LOLA events (including aircraft impacts) without the need to determine damage states or damage footprints.

Contentions MS-1, MS-3 and MS-6 do not claim that the Mitigative Strategies Report is inconsistent with NEI 06-12. Instead, as explained below, Contentions MS-1, MS-3 and MS-6 assert that the Mitigative Strategies Report is deficient because it does not include additional

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37 May 26, 2009 Letter at 1.

38 Final Security Rule, 74 Fed. Reg. at 13,958. Intervenors assert that the Commission has found that NEI 06-12 is not adequate for new plants. Appeal at 14. However, their reference to the SOC does not substantiate this argument, and in fact is inconsistent with Intervenors' argument. In summary, the LOLA rule is identical for both existing and new plants. Therefore, since NEI 06-12, Rev. 2 is appropriate for use by existing plants, it is also appropriate for new plants.

39 NEI 06-12, at 1. NEI 06-12 is not publicly available because it contains SUNSI.

information—information that is not mentioned in 10 C.F.R. §§ 52.80(d) or 50.54(hh)(2), the SOC, or NEI 06-12.

2. The Board Correctly Ruled that Contention MS-1 Failed to Provide a Legal Basis for Requiring an Evaluation of the Full Spectrum of Damage States

Contention MS-1 stated:

> 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.[40]

The Board concluded that Intervenors did not provide a legal basis for obligating the Applicant to address a full spectrum of damage states in its Mitigative Strategies Report.[41] In reaching this conclusion, the Board reviewed each of the authorities cited by Intervenors, and found that none of them provides such a basis.[42]

With respect to Intervenors' criticisms of NEI 06-12, the Board noted that Intervenors relied on statements in the introduction to NEI 06-12, that those statements are included in NEI 06-12 to provide background and context, and that they are not intended as guidance on the information applicants are required to address in a Mitigative Strategies Report.[43] In their

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[40] Contentions at 3.

[41] LBP-10-02, slip op. at 21.

[42] *Id.* at 21-23.

[43] *See id.* at 22.

Appeal, Intervenors again cite these same statements in NEI 06-12, without providing any basis for questioning the Board's reasons for concluding that they do not support this contention.[44]

The Board found that Intervenors' references to 10 C.F.R. § 50.54(hh)(1) (which pertains to aircraft impacts) and to NEI 07-13 (which pertains to the aircraft impact rule in 10 C.F.R. § 50.150) were not instructive with respect to the interpretation of 10 C.F.R. § 50.54(hh)(2). In that regard, the Board noted that Section 50.54(hh)(1) is not relevant to Section 50.54(hh)(2) and that NEI 07-13 is still in draft form and has not been endorsed by the Commission.[45] On Appeal, Intervenors simply cite the same statements, without any attempt to show that the Board made any error.[46] Intervenors' quotation from NEI 07-13 simply indicates that certain uncertainties in the assessment of the effects of aircraft impact are best addressed by the mitigative strategies described in NEI 06-12, and says nothing about the information to be included in an application about mitigation plans and strategies. The Board was clearly correct in concluding that Intervenors' quotations from NEI 07-13 are not instructive about information required to comply with Sections 52.80(d) and 50.54(hh)(2).

Similarly, the Board found that the SOC statements cited by Intervenors also were not instructive. In particular, the Board ruled that Intervenors' reliance on the adjective "effective" in the SOC was improper because Intervenors did not provide any basis for concluding that the effectiveness of mitigative strategies cannot be judged without an enumeration of damage states[47] (*e.g.*, through a flexible response capability). On Appeal, Intervenors simply repeat the same arguments they made to the Board, again without any attempt to show that the Board made

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44 Appeal at 8-9 & n.21.

45 LBP-10-02, slip op. at 22.

46 Appeal at 8-9.

47 LBP-10-02, slip op. at 22.

any error.[48] The correctness of the Board's conclusion is amply demonstrated by 1) the SOC observation that the guidance in NEI 06-12, which does not require any description of damage states, was endorsed by the Commission as an acceptable method for complying with Section 50.54(hh)(2); and 2) the Board's observation that existing operating reactors have complied with Section 50.54(hh)(2) without considering a full spectrum of damage states.[49]

Furthermore, Intervenors' arguments are inconsistent with the structure and intent of the rule. In enacting the rule, the Commission did not require the evaluation of any particular event or set of events, but instead required the identification of "operational actions" that could mitigate a range of events that are not tied to any particular fire or explosion.[50] In that regard, Section 50.54(hh)(2) is similar to the Commission's rules on emergency planning in 10 C.F.R. § 50.47, which require emergency preparedness provisions but do not require an applicant to demonstrate that it can mitigate any particular event. Thus, contrary to Intervenors' argument, an applicant is not required to calculate damage footprints or mitigate a full spectrum of damage states, but instead to identify operational actions that can be used to mitigate LOLAs in general.

Similarly, Intervenors' arguments that an applicant or licensee must address a full spectrum of damage states are inconsistent with the SOC. As the Commission stated:

> Section 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 through the use of readily available resources and identification of potential practicable areas for the use of beyond-readily-available resources.[51]

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48 Appeal at 6 & n.13.

49 Final Security Rule, 74 Fed. Reg. at 13,958; LBP-10-02, slip op. at 22 n.98.

50 Final Security Rule, 74 Fed. Reg. at 13,957.

51 *Id.* at 13,928.

This provision in the SOC belies Intervenors' argument that an applicant must show that it can mitigate the full spectrum of damage states—instead, an applicant is only required to identify "readily available resources" and "practicable" measures.

In fact, during the rulemaking for Sections 52.80(d) and 50.54(hh)(2), the Commission considered and rejected a comment that was very similar to Contention MS-1:

> Comment: Another commenter stated that proposed Part 73, Appendix C [which was later moved to Section 50.54(hh)] does not specify what types of fires or explosions the licensee must prepare for, nor does it specify what areas of the plant are considered particularly susceptible to damage or destruction by fire or explosion. . . .
>
> Response: . . . The Commission did not intend to limit beyond-design basis scenarios to aircraft attacks but, instead called for the development of mitigation measures to generally deal with the situation in which large areas of the plant were lost due to fires and explosions, whatever the beyond-design basis initiator. . . . Accordingly, as with the original section B.5.b requirements, this proposed rule would apply only performance-based criteria so that individual licensees would have to determine the most appropriate site-specific measures that would meet the general performance criteria. . . . [T]he NRC does not believe it is necessary, or even practical, that the prescription suggested by the stakeholder be incorporated into supplemental proposed § 50.54(hh).[52]

Thus, not only is Contention MS-1 lacking in any legal basis, it is inconsistent with the Commission's SOC.

In summary, Intervenors have not pointed to any specific provision in the regulation, the SOC, or the Commission-endorsed guidance in NEI 06-12 that would require an applicant or licensee to address a full spectrum of damage states.[53] In fact, the language of Sections 52.80(d) and 50.54 contains no requirement for an applicant or licensee to identify or evaluate damage

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[52] Power Reactor Security Requirements: Supplemental Proposed Rule, 73 Fed. Reg. 19,443, 19,445 (Apr. 10, 2008).

[53] In this regard, the Contention essentially constitutes an assertion by the Intervenors of what regulatory policy should be, not what the regulations, SOC, and guidance actually require. As the Appeal Board stated, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue. *See Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20-21 (1974).

states. Similarly, the SOC does not state the applicants should identify or evaluate damage states, but instead indicates that such an approach is not necessary or practical. Finally, Intervenors' position is inconsistent with NEI 06-12, which has been explicitly endorsed by the Commission for use in complying with Section 50.54(hh)(2). For all of these reasons, the Board correctly ruled that Contention MS-1 did not provide a legal basis for requiring a description of damage states.[54]

3. The Board Correctly Ruled that Contention MS-3 Failed to Provide an Adequate Legal or Factual Basis and Failed to Raise a Genuine Dispute

Contention MS-3 stated:

> 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.[55]

In LBP-10-02, the Board found that Contention MS-3 was inadmissible under 10 C.F.R. § 2.309(f)(1)(vi) because the regulations do not require the applicant to include such dose projection information in the Mitigative Strategies Report.[56] Additionally, the Board found that Contention MS-3 was not adequately supported by expert opinion or factual information and, therefore is inadmissible under 10 C.F.R. § 2.309(f)(1)(v).

On Appeal, Intervenors do not make any attempt to show that the Board's conclusion was in error. Intervenors do not point to anything in NEI 06-12, the SOC, or the rule that requires an application to provide dose projection models based upon a full spectrum of damages states. Thus, the Board correctly rejected Contention MS-3 for lack of any legal basis.

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54 *See* LBP-10-02, slip op. at 18-23.

55 Contentions at 4.

56 LBP-10-02, slip op. at 26.

Intervenors assert that Contention MS-3 is supported by the Declaration of Dr. Edwin S. Lyman. However, as the Board stated, "the declaration of Intervenors' expert, Edwin Lyman, Ph.D., fails to provide any factual explanation as to why dose projection model evaluations or other radiation studies are required during this part of the COLA process."[57] Consequently, the Board correctly ruled that Contention MS-3 is inadmissible under 10 C.F.R. § 2.309(f)(1)(v) for lack of factual support.

For these reasons, the Board correctly ruled that Contention MS-3 is inadmissible, and the Board's ruling should be upheld.

4. The Board Correctly Ruled that Contention MS-6 Failed to Provide an Adequate Legal or Factual Basis and Failed to Raise a Genuine Dispute

Contention MS-6 stated:

> 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.[58]

In LBP-10-02, the Board found that Contention MS-6 is inadmissible under 10 C.F.R. § 2.309(f)(1)(vi) because Intervenors did not provide any legal or factual support.[59] On appeal, Intervenors make no effort to show that the Board made any error.

Intervenors admit that NEI 06-12, which is endorsed by the Commission, states that an application does not need to address outage conditions.[60] Intervenors do not cite any legal

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57 *Id.*

58 Contentions at 19. Contention MS-6 is summarized in the Appeal as "The mitigative strategies are deficient because they fail to differentiate between full power operations and outage conditions." Appeal at 17.

59 LBP-10-02, slip op. at 31.

60 *See* Appeal at 17.

authority stating that mitigative strategies should address outage conditions.[61] In fact, there is nothing in the regulations, the SOC, or NEI 06-12 that requires an application to address outage conditions. Thus, the Board properly rejected Contention MS-6 for lack of legal support.

Furthermore, for applicants that utilize a flexible response capability in accordance with NEI 06-12, there is no reason to address outage conditions separately. The principles of diversity and separation established in NEI 06-12 provide assurance that mitigative strategies will be available for LOLA events occurring during outage conditions as well as full power operation.

Intervenors state that Contention MS-6 is supported by the Declaration of Dr. Lyman.[62] However, his Declaration failed to provide any explanation of why outages would need to be evaluated separately in the Mitigative Strategies Report. Thus, the Board properly rejected his Declaration as a basis for this contention.

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61 *See id.*

62 *Id.* at 17 n.52.

For these reasons, the Board correctly ruled that Contention MS-6 lacked adequate legal and factual support, and was inadmissible under 10 C.F.R. § 2.309(f)(1)(v) and (vi).

V. CONCLUSION

For each of the foregoing reasons, Intervenors' appeal of LBP-10-02 should be denied.

Respectfully submitted,

Executed in Accord with
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Dated in Washington, D.C.
this 19th day of February 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket Nos. 52-012-COL 52-013-COL
STP NUCLEAR OPERATING COMPANY	)	
(South Texas Project Units 3 and 4)	)	February 19, 2010

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2010 a copy of "STP Nuclear Operating Company's Brief Opposing Intervenors' Appeal of LBP-10-02" was served by the Electronic Information Exchange on the following recipients:

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