3-5

~~Official Use Only - Security-Related Information~~

September 8, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S ANSWER TO INTERVENORS' CONTENTIONS AND REQUEST FOR A SUBPART G HEARING

Pursuant to the Atomic Safety and Licensing Board's (Board) Order dated July 1, 2009,[1] the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) hereby answers the "Intervenors' Contentions Regarding Applicant's Submittal Under 10 C.F.R. § 52.80(d) and 10 C.F.R. § 50.54(hh)(2) and Request for Subpart G Hearing" ("New Contentions"), filed on August 14, 2009. As discussed below, Intervenors have failed to proffer any admissible contentions and have failed to demonstrate that Subpart G hearing procedures are appropriate. Therefore, Intervenors seven new proposed contentions should be dismissed and request for Subpart G hearing procedures denied.

BACKGROUND

On April 21, 2009, SEED Coalition, Susan Dancer, South Texas Association for Responsible Energy, Daniel A. Hickl, Public Citizen, and Bill Wagner (collectively, Intervenors) submitted a petition to intervene ("Petition") in the South Texas Units 3 and 4 (STP) combined

[1] *STP Nuclear Operating Co.* (South Texas, Units 3 & 4) ML091820419 (July 1, 2009) (unpublished order) (slip op.) ("Protective Order").

d-12

license (COL) proceeding.[2] Intervenors' Proposed Contention 2 alleged, in part, that the COL application omitted information required by 10 C.F.R. § 52.80(d), pursuant to the Power Reactor Security Requirements rule, 74 Fed. Reg. 13,926 (Mar. 27, 2009). On May 26, 2009, the Applicant filed a Mitigative Strategies Report addressing the requirements of 10 C.F.R. § 52.80(d) and stated that the filing "renders Contention 2 moot."[3] At the prehearing conference on standing and contention admissibility held on June 23-24, 2009, the Staff agreed that the Applicant's filing of the missing information in the Mitigative Strategies Report rendered the admissible portion of Contention 2 moot. *STP Nuclear Operating Co.* (South Texas, Units 3 & 4), Oral Argument Transcript (June 23, 2009) at 31 (ML091820418) ("Tr").

The Applicant's Mitigative Strategies Report is not, however, publically available because it contains sensitive unclassified non-safeguards information (SUNSI). Therefore, the Board issued a Protective Order governing disclosure of this information. *See* Protective Order. Intervenors received the protected information on July 7, 2009. Petitioners' Brief Regarding Contention Two's Mootness at 1 (July 21, 2009) ("Mootness Brief"). On July 14, 2009 Intervenors gave notice to the Board, Applicant, and Staff, via letter, that based on receipt of the protected information, its position is that Proposed Contention 2 is not moot. *Id.;* Letter from Robert Eye to J. Gibson (July 14, 2009). Intervenors filed their Brief regarding Contention 2's mootness on July 21, 2009. The Staff and Applicant filed their Answers in Response to Intervenors' Mootness Brief on July 30 and July 27, 2009, respectively. Both the Staff and

---

[2] The Staff and Applicant submitted timely answers to the Petition on May 18, 2009. Intervenors timely replied on May 26, 2009.

[3] Letter from Steven P. Frantz, Morgan, Lewis & Bockius to the Board, "Notification of Filing Related to Proposed Contention 2" (May 27, 2009) (ML091470724).

Applicant argued that the Applicant's May 26, 2009 submittal rendered Contention 2 moot. The Board issued an Order ruling on the admissibility of 19 of the 28 contentions raised in the Petition on August 27, 2009; the Board ruled that Contention 2 was moot.[4]

On August 14, 2009, Intervenors filed seven new contentions based on the Applicant's Mitigative Strategies Report in accordance with the Board's Protective Order. In addition, Intervenors requested the use of Subpart G procedures for these contentions. New Contentions at 22.

DISCUSSION

I. Legal Requirements for Contentions

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 (formerly 10 C.F.R. § 2.714(b)).[5]

The standards in 10 C.F.R. § 2.309(f)(1) may be summarized as follows, an admissible contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is

---

[4] *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 and 4), LBP-09-21, 70 NRC __ (Aug. 27, 2009) (slip op. at 11).

[5] In 2004, the requirements of former § 2.714, together with rulings regarding contentions set forth in Commission cases were re-codified by the Commission in 10 C.F.R. § 2.309. *See* Changes to Adjudicatory Process (Final Rule), 69 Fed. Reg. 2182 (Jan. 14, 2004), *as corrected*, 69 Fed. Reg. 25,997 (May 11, 2004). In the Statements of Consideration for the final rule, the Commission cited several Commission and Atomic Safety and Licensing Appeal Board decisions applying former § 2.714 in support of the codified provisions of § 2.309. *See* 69 Fed. Reg. at 2202. Accordingly, Commission and Atomic Licensing Appeal Board decisions regarding former § 2.714 retain their vitality, except to the extent the Commission changed the provisions of § 2.309 as compared to former § 2.714.

material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute with the Applicant exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. *See* 10 C.F.R. § 2.309(f).

The purpose of the contention rule is to "focus litigation on concrete issues and result in a clearer and more focused record for decision." 69 Fed. Reg. at 2202; *see also Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553-54 (1978); *BPI v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974); *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974). The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing." 69 Fed. Reg. at 2202. 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. 69 Fed. Reg. at 2221; *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).

Finally, it is well established that the purpose for requiring a would-be intervener to establish the basis of each proposed contention is: (1) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; (2) to establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (3) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose. *Peach Bottom*, ALAB-216, 8 AEC at 20-21; *Ariz. Pub. Serv. Co., et al.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 400 (1991).

These rules focus the hearing process on real disputes susceptible to resolution in an adjudication. *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999). Further, "a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations or to express generalized grievances about NRC policies." *Id.* Specifically, NRC regulations do not allow a contention to attack a regulation unless the proponent requests a waiver from the Commission. *See* 10 C.F.R. § 2.335; *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 17-18 and n.15 (2007) (citing *Millstone*, CLI-01-24, 54 NRC at 364).

II. NRC Staff Response to Proposed Contentions

A. Contention 1

> 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.

New Contentions at 5-6.

Intervenors frame Proposed Contention 1 as a contention of omission arguing that the Application is deficient because it omits information regarding the numbers and size of fires and explosions anticipated from an initiating event. New Contentions at 7-9. Intervenors note that the Applicant relies on NEI-06-12 B.5.b Phase 2 & 3 Submittal Guidelines, Rev. 2, which does not consider the scale of potential fires or explosions. *Id.* at 8-9 (citing NEI-06-12 at 12). Intervenors argue that without this omitted information, "there is no meaningful way to determine whether the mitigative strategies in the Applicant's submittal are adequate to deal with fires and explosions that would be caused by the impact of a large commercial airliner(s) or other initiating event(s)." *Id.* at 9. Finally, Intervenors claim that failure to include this information raises a genuine dispute regarding a material issue of fact and that they have provided sufficient information to demonstrate that the Application is incomplete. *Id.* at 6, 12 (citing 10 C.F.R. § 2.309(f)(1)(v) and (vi)).

Staff Response: Proposed Contention 1 is inadmissible because Intervenors have not demonstrated that the Application fails to contain information on a relevant matter as required

by law, and constitutes an impermissible attack on the Commission's regulations without requesting a waiver under 10 C.F.R. § 2.335.

1. Proposed Contention 1 Cannot be Construed as an Admissible Contention of Omission

Section 2.309(f)(1)(vi) requires that, "if the petitioner believes that the application fails to contain information on a relevant matter as required by law," the Petitioner must identify "each failure and the supporting reasons for the petitioner's belief." 10 C.F.R. § 2.309(f)(1)(vi). If a petitioner fails to identify information she believes is missing as a matter of law and provide supporting reasons for this belief, then she must reference "specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute" in order to satisfy 10 C.F.R. § 2.309(f)(1)(vi).

Here, Intervenors claim that the Mitigative Strategies Report is deficient because it omits the numbers and magnitudes of fires and explosions that could be caused by a large commercial aircraft. New Contentions at 5. Intervenors have not, however, provided the requisite legal basis for this claimed omission. *See* 10 C.F.R. § 2.309(f)(1)(vi). In fact, Intervenors acknowledge that the rule language in 10 C.F.R. § 50.54(hh) does not contain a requirement that the Applicant identify the number and magnitude of fires and explosions resulting in loss of large areas of the plant, and Intervenors do not identify an alternative legal requirement that requires the Applicant describe the number and magnitude of fires and explosions. *See* New Contentions at 7.[6] While Intervenors have described the information they

---

[6] The Power Reactor Security Requirements; Final Rule, 74 Fed. Reg. 13,926 (Mar. 27, 2009) states in pertinent part that a combined license application must contain:

Continued...

believe is missing from the Application, they have not provided the legal basis that requires the omitted information be included, and thus have failed to satisfy 10 C.F.R. § 2.309(f)(1)(vi). *See Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs Unit 3), LBP-09-04, 69 NRC __ (Mar. 24, 2009) (slip op. at 22).

Instead of pointing to a regulatory requirement to support their assertion, Intervenors assert that the Statement of Considerations (SOC) for the Power Reactor Security Requirements rule "require[s] that the mitigative strategies response procedures consider aircraft attacks as a baseline for determining the scale of fires/explosions that would be assumed to occur and therefore addressed by the requirements of 10 C.F.R. § 50.54(hh)(2)." New Contentions at 7 (citing 74 Fed. Reg. at 13,927-928). However, while an SOC provides useful guidance on the proper application of the regulations and is entitled to special weight, it is not itself a regulation.[7] Further, contrary to Intervenors position, the SOC provides that

---

Continued . . .

> (d) 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.

10 C.F.R. § 52.80(d).

> (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.

10 C.F.R. § 50.54(hh)(2).

[7] The Statement of Considerations, "which explains the Commission's basis for, and interpretation of, the regulatory language . . . , provides useful guidance on the proper application of the requirements – guidance that is entitled to 'special weight.'" *Connecticut Yankee Atomic Power* Company Continued...

mitigative strategies can address losses of large areas of a plant from a variety of causes, including aircraft impacts and beyond-design-basis security events. 74 Fed. Reg. at 13,933. The Commission did not intend for the mitigative strategies to be limited to addressing plant losses due to aircraft impacts. Specifically, the Commission stated that "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. at 13,957 (emphasis added). Rather than suggesting any intent that an applicant describe the scale or magnitude of fires and explosions, these statements demonstrate that the Commission did not intend to limit beyond-design-basis security events to one or another cause, much less establish aircraft impacts as a baseline. Thus, Intervenors reference to the SOCs fails to demonstrate that the Application is missing relevant information required by law. *See* 10 C.F.R. § 2.309(f)(1)(vi).

Similarly, Intervenors references to NEI guidance documents do not demonstrate that the Application is missing information required by law. *See* 10 C.F.R. 2.309(f)(1)(vi). First, Intervenors argue that the Applicant's reliance on NEI-06-12 "may be inadequate to 'ensure success under the full spectrum of potential damages states.'" New Contentions at 19 (quoting NEI-06-12 at 1). [redacted] (b)(4) However, the Commission has endorsed NEI-06-12,

EXEMPTION 4 NRC

Continued . . .
(Haddam Neck Plant) LBP-01-21, 54 NRC 33, 47 (2001) (citing *Long Island Lighting* Company (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 N.R.C. 275, 290-91 (1988)).

Revision 2, as an acceptable means for current licensees to address the requirements of 10 C.F.R. § 50.54(hh)(2). *See* 74 Fed. Reg. at 13,958. As discussed herein, 10 C.F.R. § 50.54(hh)(2) does not require an applicant to discuss the full spectrum of potential damages states. Second, Intervenors argue that NEI-07-13, which is the draft regulatory guidance for the aircraft impact design regulation (10 C.F.R. § 50.150), states that analyses of uncertainties including hot shorts, spurious actuations, actual fire spread, shock effects, and estimated physical damage footprint will be addressed through 10 C.F.R. § 50.54(hh). New Contentions at 11 (quoting NEI-07-13, Rev. 7 at 2-3 (May 2009)). However, Intervenors reliance on NEI-07-13 is misplaced. NEI-07-13 does not demonstrate that 10 C.F.R. § 50.54(hh) requires that the allegedly missing information be included in the Applicant's Mitigative Strategies Report. NEI-07-13 is draft guidance created for the Aircraft Impact Rule, 10 C.F.R. § 50.150; this draft guidance was not created to provide guidance for compliance with 10 C.F.R. § 50.54(hh)(2). Thus, Intervenors' reliance on guidance documents does not create a regulatory requirement sufficient to support a contention of omission. *See* 10 C.F.R. § 2.309(f)(1)(vi).

Because Intervenors have failed to demonstrate that the allegedly missing information is required by the Commission's regulations, Intervenors have failed to proffer an admissible contention of omission. Accordingly, Proposed Contention 1 should be dismissed.

2. To the Extent That Intervenors Are Challenging 10 C.F.R. § 50.54(hh)(2), Contention 1 Should be Dismissed

To the extent that Intervenors seeks to challenge 10 C.F.R. § 50.54(hh)(2), this contention is barred from consideration in this proceeding by 10 C.F.R. § 2.335.

Here, Intervenors argue that the Applicant's Mitigative Strategies Report is insufficient because it does not "discuss the full spectrum of damage states consistent with the loss of large areas of the plant due to explosions or fire and fails to provide analysis demonstrating that given

the full spectrum of damage states, the proposed mitigative measures are sufficient . . . ." New Contentions at 6. Intervenors also assert that "the Commission cannot be expected to make a reasonable case-by-case determination without an adequate starting point," which assumes that the Commission does not have "an adequate starting point." *Id.* at 13.

The ability of the Commission to determine the effectiveness of a mitigative strategies plan is not, however, dependant on an Applicant describing the magnitude and number of fires and explosions possible from a beyond-design-basis event as discussed herein. As acknowledged by Intervenors,[8] the Commission has already studied the extent and magnitude of fires and explosions caused by beyond-design-basis events. "In early 2002, NRC launched a classified vulnerability assessment program for nuclear facilities for a wide range of hypothetical attacks, using internal and Department of Energy (DOE) national laboratory resources."[9] The NRC performed additional analysis of spent fuel cooling and contracted with Sandia National Laboratories to perform such studies for completion in 2005. *Id.* The NRC also contracted with Sandia to perform experimental work to confirm analytical modeling, and finally the NRC was

---

[8] *See* New Contentions at 11 n.8.

[9] Letter from Chairman, Nils J. Diaz to The Honorable Pete V. Domenici, United States Senate (Mar. 14, 2005), U.S. Nuclear Regulatory Commission Report to Congress on the National Academy of Sciences Study on the Safety and Security of Commercial Spent Nuclear Fuel Storage, at 10 (Mar. 2005) (ML050280428).

> The NRC agrees with the value of some additional analyses and as noted above has initiated plant-specific assessments on the loss of large areas of the plant to fire and explosions, including the identification of mitigation strategies and the collection of detailed design information on SFPs [spent fuel pools] for further evaluation. However, the NRC considers the breadth and range of additional analyses and sensitivities recommended by the NAS [National Academies of Sciences] report to be more than is needed for informed decision making, when considering what is currently well understood and the most effective and efficient use of NRC and licensee resources.

Report to Congress at 16-17.

participating in a long-term international cooperative testing program to examine fuel heat-up behavior in an air environment. *Id.* "The NRC has conducted detailed, site-specific engineering studies of a limited number of typical plants to assess potential vulnerabilities of nuclear power plants to deliberate attacks involving large commercial aircraft. The results of these studies have confirmed the effectiveness of the required mitigative measures and have identified further enhancements to mitigative strategies."[10] "The NRC has utilized the insights from its classified research on security assessments to direct that appropriate imminent threat procedures be developed at each power reactor."[11] "Implementation of these procedures significantly enhances mitigation capabilities." *Id.* The Commission used its knowledge gained from the study of beyond-design-basis events to inform its rulemaking. *Id.* at 3. Thus, Intervenors' premise that "the Commission cannot be expected to make a reasonable case-by-case determination without an adequate starting point" fails to acknowledge that the Commission has already studied the full spectrum of damage states that could result from a beyond-design-basis event.

A contention proffering additional or stricter requirements than those that are imposed by the regulation are not admissible. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001) (internal citations omitted). Here, Intervenors challenge the rule to the extent that it does not require Applicants to describe the number or magnitude of fires and explosions, and only requires the Applicants to

---

[10] Letter from Chairman, Nils J. Diaz to The Honorable Tom Ridge, U.S. Department of Homeland Security at 2 (Sept. 8, 2004) (ML042400525).

[11] Letter from Chairman, Dale E. Kline to the Honorable Michael Chertoff, U.S. Department of Homeland Security at 2 (Aug. 28, 2006) (ML062340047).

describe their mitigative strategies. However, as discussed above, the Commission's regulation does not require an applicant to discuss the scale and magnitude of fires nor does it require an applicant to establish a baseline. Thus, based on the Commission's knowledge of the expected extent of loss due to fires and explosions, there is no need for an applicant to describe the expected loss or establish a baseline, and any argument by Intervenors to the contrary is a challenge claiming the rule is either deficient or needs to be strengthened. To the extent that Intervenors are challenging the Commission's "staring point" and the underlying assumptions to 10 C.F.R. § 50.54(hh)(2), Contention 1 should be dismissed because an attack on a Commission regulation is only permitted where a waiver is explicitly granted or an exception is made for a particular proceeding. 10 C.F.R. § 2.335(a), (b). Neither a waiver nor exception has been granted. Therefore, to the extent Proposed Contention 1 constitutes an attack on a Commission regulation, it should be dismissed. *See* 10 C.F.R. § 2.335.

B. Contention 2

(b)(4)

The submittal does not specify that the subject assessments, evaluations, etc. will be done based on the full spectrum of damage states. The assessments, evaluations, etc. will evidently determine the scope of the Phase 1 fire fighting strategy and therefore must be done with the full spectrum of damage states in order to determine whether the proposed fire suppression strategies are adequate.

Exemptions 4
South Texas

New Contentions at 14. Intervenors argue that it is unreasonable for the Applicant to assume that the missing assessments, evaluations, action plans, and procedures can be delayed until near the completion of construction. *Id.* Intervenors claim that these assessments must be completed now to determine if the Applicant has met the requirements of 10 C.F.R. § 50.54(hh)(2). *Id.* Intervenors reason that these plans "should be developed sooner rather

than later" because the Applicant will have to submit these assessments in accordance with the Aircraft Impact rule, 10 C.F.R. § 50.150. *Id.* at n.9. Finally, Intervenors state that they incorporate by reference the arguments and authorities referenced in Proposed Contention 1. *Id.* at 14.

Staff Response: As explained more fully below, the Staff opposes admission of Proposed Contention 2 because it fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi) and impermissibly challenges the Commission's regulation. *See* 10 C.F.R. § 2.335.

1. Proposed Contention 2 Fails to Meet the Requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi)

Intervenors' assertion that the Applicant should complete the assessments, evaluations, action plans, and procedures based on a full spectrum of damage states in its Mitigative Strategies Report is not supported by facts, expert opinion, or a regulatory basis and fails to raise a genuine dispute with the Applicant regarding material issue of law or fact. *See* New Contentions at 14.

First, as discussed above in Proposed Contention 1, Intervenors failed to reference any regulation that requires an applicant to consider "the full spectrum of damage states." Therefore, Interveners assertion that the Applicant is required to complete assessments, evaluations, action plans, and procedures based on the full spectrum of damages states fails to raise a genuine dispute regarding a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(vi).

Second, Intervenors failed to provide a regulatory basis or facts to support the assertion that the allegedly missing assessments, evaluations, action plans and procedures are required to be included in the Mitigative Strategies Report. *See* New Contentions at 14. The Commission has explicitly stated that a mitigative strategies report is like an operating program,

such that an applicant is only required to submit a program description with its application; more detailed procedures will be implemented and inspected before operation. *See* 74 Fed. Reg. at 13,933. Thus, absent a supporting regulatory requirement, Intervenors assertion that the allegedly missing assessments, evaluations, action plans and procedures cannot be deferred until near the end of construction, is not sufficient to raise a genuine dispute. *See* 10 C.F.R. § 2.309(f)(1)(vi).[12]

Third, Intervenors suggestions that the allegedly missing information is "far too important for deferral to a date in the future when operation of the plant is imminent" and that the allegedly missing information should be submitted now because it will have to be submitted to comply with the Aircraft Impact rule, 10 C.F.R. § 50.150, do not support the admission of this Proposed Contention. *See* New Contentions at 14-15 & n.9. Not only have Intervenors failed to provide any factual or expert support to demonstrate why this information "is far too important" not to be included in the Mitigative Strategies Report, but Intervenors have also failed to reference a regulation requiring such information be submitted in this Report. Therefore, because Intervenors have failed to provide facts, expert opinion, or a regulatory basis to support their assertion that the Applicant's Mitigative Strategies Report is deficient because it fails to include

---

[12] Intervenors provide the opinion of Dr. Lyman. Dr. Lyman did not, however, provide any factual information or expert opinion to support admission of this contention. Dr. Lyman simply states that he reviewed the information provided in Contention 2 and approves of its content. Lyman Declaration at ¶4. Thus, Dr. Lyman did not provide any alleged facts or expert opinion to support admission of Contention 2. *See* 10 C.F.R. § 2.309(f)(1)(v). "'[A]n 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 because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion . . . .'" *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (discussing expert support in the context of contention admissibility) (quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998)).

assessments, evaluations, action plans, and procedures, Proposed Contention 2 should be dismissed. *See* 10 C.F.R. § 2.309(f)(1)(v) and (vi).

2. Contention 2 Should be Dismissed as an Impermissible Attack on the Commission's Regulation

Intervenors argue that the allegedly missing assessments, evaluations, action plans, and procedures for Phase 1 mitigative strategies must be completed "with the full spectrum of damage states in order to determine whether the proposed fire suppression strategies are adequate." New Contentions at 14. As discussed above with regard to Proposed Contention 1, the ability of the Commission to determine the effectiveness of a mitigative strategies plan is not dependant on an Applicant describing the magnitude and number of fires and explosions possible from a beyond-design-basis event. The NRC has conducted a number of detailed studies to assess potential vulnerabilities of nuclear power plants, the results of which have confirmed the effectiveness of the required mitigative measures and have identified further enhancements to mitigative strategies.[13] Information from these studies was used by the Commission to inform its rulemaking for 10 C.F.R. § 50.54(hh)(2).

Intervenors fail to provide any facts or expert opinion to demonstrate that the allegedly missing information is required in order to determine whether the Applicant's proposed strategies, specifically the fire suppression strategies, are adequate. *See* New Contentions at 14. Further, as discussed above, 10 C.F.R. § 50.54(hh) does not require that the allegedly missing information be required. Proposed Contention 2 does not acknowledge that the Commission has already studied the full spectrum of damage states that could result from a

---

[13] Letter from Chairman, Nils J. Diaz to The Honorable Tom Ridge, U.S. Department of Homeland Security at 2 (Sept. 8, 2004) (ML042400525).

beyond-design-basis event. In addition, the Commission specifically stated that like operating programs, applicants are only required to submit descriptions of their mitigative strategies at this point in the application process. *See* 74 Fed. Reg. at 13,933. Thus, like Proposed Contention 1, Proposed Contention 2 challenges 10 C.F.R. § 50.54(hh)(2). Accordingly, Proposed Contention 2 should be dismissed as an impermissible challenge to the Commission's regulation because a waiver or exception has not been granted. *See* 10 C.F.R. § 2.335(b).

C. Contention 3

(b)(4)

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.

New Contentions at 15. Intervenors argue that the Applicant cannot demonstrate that its plan for mitigating Loss of Large Areas (LOLAs) can be executed without subjecting responders to excessive radiation exposure absent the inclusion of an "appropriately detailed and accurate model based on the full spectrum of damage states." *Id.*

Staff Response: Contention 3 is inadmissible because it is not supported by a concise statement of the alleged facts or expert opinion. *See* 10 C.F.R. § 2.309(f)(1)(v).

1. Contention 3 Should Be Dismissed For Failure to Comply With 10 C.F.R. § 2.309(f)(1)(v)

Intervenors assert that the Applicant cannot demonstrate that its plan for mitigating accidents can be executed without subjecting on-site responders to excessive radiation exposure. New Contentions at 15. However, Intervenors only provide the bare assertion that "mitigative measures will put emergency responders in situations that will result in major exposures . . . ." New Contentions at 15. Intervenors do not attempt to quantify what "major

exposures" are nor do Intervenors point to a regulatory requirement indicating that an Applicant is required to commit to evaluate dose projection models for the "full spectrum of damages states." *See id.* at 15.[14] Although Intervenors provide the opinion of Dr. Lyman to support this contention, Dr. Lyman fails to provide a basis to support this contention (Lyman Decl. at ¶4); he does not explain why the allegedly missing information is required nor does he provide a reasoned basis for his opinion. *See USEC*, CLI-06-10, 63 NRC at 472 ("[A]n 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 because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion.").

(b)(4)

This guidance document does not, however, demonstrate that the Applicant is required to describe possible damage states quantitatively and qualitatively. Nor does it demonstrate that the Applicant is required, by regulation, to consider dose projection models for the full spectrum of damage states. Further, with regard to dose projections and emergencies, the Commission stated that its intent was that:

> the regulations be observed to the extent practicable during emergencies, but that conformance with the regulations should not hinder any actions that are necessary to protect public health and safety such as lifesaving or maintaining confinement of radioactive materials.
>
> In this regard, the Commission notes that the Federal guidance on occupational radiation protection states that those dose standards only apply to normal operating conditions. The Commission believes that the dose limits for normal operation should remain the primary guidelines in emergencies. However, the Commission also recognizes that, in an emergency, operations that do not conform to the regulations may have to be carried out to achieve the high-priority tasks of worker, public, and facility protection. The purpose of the addition to this section is to assure licensees that their first priority should be to carry out those actions that are necessary to protect workers and the public from radiation exposure, to perform lifesaving activities, to prevent or limit the spread of radioactive contamination or the release of radioactive materials to the environment, and to preserve an adequate margin of safety.

Standards for Protection Against Radiation, Final Rule, 56 Fed. Reg. 23,360, 23,365 (May 21, 1991) (discussing 10 C.F.R. § 20.1001).

EXEMPTION 4 NUREG

Therefore, Proposed Contention 3 should be dismissed because it is based on bare assertions, which are insufficient to form the basis of an admissible contention. *See* 10 C.F.R. § 2.309(f)(1)(v); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 180 (1998) (citing *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *aff'd in part*, CLI-95-12, 42 NRC 111 (1995) (A petitioner is obligated "to provide the [technical] analyses and expert opinion" or other information "showing why its bases support its contention.")).

D. Contention 4

(b)(4)

However, the MST does not specify whether the LOLA "event" commitments/strategies are or will be developed based on a damage footprint of sufficient extent and severity to accommodate the likely impact(s) of large commercial airliner(s) and/or the full spectrum of damage states. Accordingly, there is no way to determine whether the proposed mitigative strategies are adequate.

New Contentions at 16-17. Intervenors argue that the Applicant's Mitigative Strategies Report does not include the underlying assumptions related to the magnitude of initiating events. *Id.* at 17. Specifically, Intervenors claim that this Report "anticipate[s] specific actions that are dependent on specifications of the damage states that can be expected in the LOLA." *Id.* Intervenors argue that in order to cure this deficiency, the Applicant must submit a "comprehensive analysis that fully accounts for and discusses how each [commitment/strategy] is dependent on the magnitude of the initiating event[s] . . . ." *Id.* at 18.

Exemption 4 South Texas

Staff Response: The Staff opposes admission of Proposed Contention 4 because it fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi), and constitutes an impermissible attack on the regulations without requesting a waiver under 10 C.F.R. § 2.335(b).

1. Proposed Contention 4 Cannot be Construed as an Admissible Contention of Omission

Intervenors state that Proposed Contention 4 is a contention of omission, which addresses similar deficiencies as those discussed in Proposed Contention 1. New Contentions at 17. Intervenors claim that the Applicant is required to submit a comprehensive analysis of the full spectrum of damage states in order to determine whether LOLA event commitments/strategies are adequate. *Id.* at 18. Specifically, Intervenors point to 16 commitments and strategies outlined in the Applicant's Mitigative Strategies Report which, according to Intervenors, reference unspecified LOLA events. *Id.* at n.11. However, like Proposed Contention 1, Intervenors fail to provide a legal basis to support the claim that the Applicant must identify the "full spectrum of damage states." *See* 10 C.F.R. § 2.309(f)(1)(vi). As explained in the Staff's response to Proposed Contention 1, the Applicant is not required to develop or implement strategies/commitments in the context of a site-specific spectrum of events or damage states or show that the strategies/commitments meet performance criteria based on a site-specific spectrum of events or damage states. Thus, Proposed Contention 4 is inadmissible to the same extent as Proposed Contention 1. *See* 10 C.F.R. § 2.309(f)(1)(vi). Similarly, Intervenors do not provide a regulatory basis to support their argument that there must be an analysis of how each particular mitigative measure is dependent on the magnitude of the initiating event. Likewise, Proposed Contention 4 is inadmissible to the extent it incorporates Contention 1, because as discussed in Proposed Contention 1, this constitutes an impermissible attack on the Commission's rule.

The Commission does not view the mitigative strategies as pertaining to only one possible beyond design basis event. "The NRC recognizes that these mitigative strategies are beneficial for the mitigation of all beyond-design basis events that result in the loss of large areas of the plant due to explosions or fires." 74 Fed. Reg. at 13,957. Intervenors do not challenge the adequacy of the mitigative strategies; rather Intervenors simply state "there is no way to determine whether the proposed mitigative strategies are adequate" without information regarding the number and magnitude of fires and explosions. *See* New Contentions at 17. This raises the same issue as Proposed Contention 1, i.e., whether or not the Applicant must identify the number and magnitude of fires and explosions from the beyond design basis events. Even if the Commission intended each COL applicant to describe the number and magnitude of fires and explosions, the Commission "views the mitigative strategies as similar to those operational programs for which a description of the program is provided and reviewed by the Commission as part of the combined license application and subsequently the more detailed procedures are implemented by the applicant and inspected by the NRC before plant operation." 74 Fed. Reg. at 13,933. Thus, the mitigative strategies need only be described in an application.

Consequently, Proposed Contention 4 is inadmissible because Intervenors do not provide the required legal basis to support a contention of omission because they have not shown that the Application fails to contain required information. 10 C.F.R. § 2.309(f)(1)(vi). Additionally, Intervenors' arguments that the Applicant must submit the allegedly missing information is an impermissible attack on the Power Reactor Security Requirements rule, and a wavier or exception has not been granted. *See* 10 C.F.R. § 2.335(b).

2. Contention 4 Fails to Meet the Requirement of 10 C.F.R. § 2.309(f)(1)(v)

Intervenors claim that absent a comprehensive analysis of the full spectrum of damage states for the 16 referenced commitments and strategies, it is impossible to determine whether the mitigative strategies are adequate. New Contentions at 17. Intervenors have not, however, provided any factual support or expert opinion to support this position. Although Intervenors provide the Declaration of Dr. Lyman, Dr. Lyman states that he reviewed Proposed Contention 4; he did not provide any facts or expert opinion to support this contention. *See* Lyman Decl. at ¶4. Absent "documents or other factual information or expert opinion that set forth the necessary technical analysis to show why the proffered bases support its contention," Intervenors' "bald assertion that a matter ought to be considered or that a factual dispute exists . . . is not sufficient" to support admission of this contention. *See PFS*, LBP-98-7, 47 NRC at 180 (citing *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *aff'd in part*, CLI-95-12, 42 NRC 111 (1995) (A petitioner is obligated "to provide the [technical] analyses and expert opinion" or other information "showing why its bases support its contention."). Accordingly, because Intervenors have failed to provide alleged facts or expert, Proposed Contention 4 should be dismissed for failure to comply with 10 C.F.R. § 2.309(f)(1)(v).

E. Contention 5

(b)(4)

However, the guidance also concedes that the "[i]dentified response capabilities will not ensure success under the full spectrum of potential damage states." Accordingly, the submittal should reconcile the premise that no heroic actions will be required with the recognition that the mitigative measures may be unsuccessful, considering the full spectrum of damage states, and that heroic actions would in fact be required to actually mitigate the effects of fires and explosions

Exempt 4 NRC

> that are not controlled by use of the Applicant's mitigative measures.

New Contentions at 18. Intervenors argue that "to effectively suppress nuclear plant fires that do not respond to the mitigative measures in the Applicant's submittal, extraordinary actions, either individual or collective, would be required." *Id.* Intervenors claim that "[t]here are no procedures . . . to determine which individual(s) would receive higher doses of radiation above those that might be incurred by individuals carrying out the STP Emergency Plan . . . ." *Id.* at 18-19.

Staff Response: As explained more fully below, the Staff opposes admission of Proposed Contention 5 because it fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v)and (vi) and constitutes an impermissible attack on the regulations without requesting a waiver under 10 C.F.R. § 2.335.

1. Proposed Contention 5 Fails to Meet the Requirements of 10 C.F.R. §§ 2.309(f)(1)(v) and (vi) and 2.335

To support Proposed Contention 5, Intervenors incorporate by reference the arguments that they make in preceding contentions. New Contentions at 19. Proposed Contention 5 is inadmissible to the same extent as Proposed Contention 1, because Intervenors do not provide a legal basis for the claim that the Applicant must identify the "full spectrum of damage states" as explained in the Staff's response to Proposed Contention 1. 10 C.F.R. § 2.309(f)(1)(vi). Likewise Proposed Contention 5 is inadmissible to the extent it incorporates Proposed Contention 1 because, as explained in the Staff's response to Proposed Contention 1, it is an impermissible attack on Commission regulation. Finally, Proposed Contention 5 is inadmissible because it does not include sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(vi).

Intervenors refer to the NRC approved NEI-06-12 guidance document which states, "Implementation of this strategy is not expected to require extraordinary or heroic actions" NEI 06-12, Rev. 2, Dec. 2006 at 7, 11, 17, 31, 44 (ML070090060). Intervenors note that NEI-06-12 states that "[i]dentified response capabilities will not ensure success under the full spectrum of potential damage states." New Contentions at 18 (quoting NEI 06-12 at 1).[15] Intervenors do not

(b)(4)

EXEMPTION 4 NEI

Continued...

(b)(4)

[16] Dr. Lyman states that he provided the facts and his expert opinion with regard to Contention 5. *See* Lyman Decl. at ¶4. However, Dr. Lyman's Declaration does not provide any factual information or expert opinion to support this Proposed Contention. *See id.*

F. Contention 6

> 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.

New Contentions at 19. Intervenors claim that differences during outages compared to full-power operation may significantly impact the effectives of LOLA mitigative strategies. *Id.* at 20. Specifically, Intervenors note that differences include whether safety systems are in service for maintenance, the containment hatch may be open, the core may be off-loaded, and a higher number of contractor personnel on-site may impact the effectiveness of the mitigative strategies. *Id.* Intervenors argue that the Applicant's use of NEI 06-12 is not sufficient because this guidance uses "arbitrary restrictions" that are non-conservative. *Id.* (citing NEI 06-12, Rev. 2 at 10). Thus, Intervenors argue that in order to comply with 10 C.F.R. § 50.54(hh)(2), the Applicant must consider circumstances during an outage and modify its mitigative strategies accordingly. *Id.*

Staff Response: The Staff opposes admission of Proposed Contention 6 because it fails to raise a genuine dispute regarding a material issue of law or fact and is not adequately supported. *See* 10 C.F.R. 2.309(f)(1)(v), (vi).

1. Contention 6 fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi)

Intervenors claim that to comply with 10 C.F.R. § 50.54(hh)(2), the Mitigative Strategies Report must specifically "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." New Contentions at 20. Intervenors do not, however, provide any regulatory support for their assertion that an Applicant is required to have mitigative strategies for both operations

and outages. Section 50.54(hh)(2), does not differentiate between outages and operations; rather, it simply states that licensees are required to "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 . . . ." Therefore, because Intervenors fail to provide supporting reasons for their belief that the allegedly missing information is required by the Commission's regulations, this contention should be dismissed. *See* 10 C.F.R. § 2.309(f)(1)(vi).

2. Proposed Contention 6 fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v)

Intervenors claim that because there are differences between the conditions during outages and operations, and that the Applicant should consider mitigative strategies for both conditions. New Contentions at 20. Intervenors note that the Applicant follows the guidelines in NEI-06-12 which specifically 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% percent.'" *Id.* (quoting NEI-06-12, Rev. 2 at 10, 11). Intervenors claim that this guidance is arbitrary and non-conservative. *Id.* Intervenors do not, however, provide factual support to demonstrate that this guidance is non-conservative and arbitrary because the effectiveness of strategies will in fact be impacted by outage conditions nor do they demonstrate that the Mitigative Strategies Report is inadequate. Although Intervenors provide a declaration from Dr. Lyman in which Dr. Lyman states that he is responsible for the factual content and expert opinions expressed in Proposed Contention 6, neither Dr. Lyman's declaration nor the Proposed Contention explain why or how the conditions during outages render the mitigative strategies inadequate. "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 because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion." *See USEC,* CLI-06-10, 63 NRC at 472 (internal citation omitted). Intervenors have failed to offer anything more than the bare assertion that the mitigative strategies may not be implemented effectively during outages. Therefore, Proposed Contention 6 should be dismissed because it does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(v).

G. Contention 7

> (b)(4) However, there is no discussion of the number or magnitude of fires that would require water nor the full spectrum of damage states that would require fire suppression and cooling functions. There is no evidentiary support for an assumption by the Applicant that adequate supplies or pumping capacity is available simultaneously for emergency reactor cooling, SFP cooling and suppressing multiple fires.

New Contentions at 21. Intervenors claim that Proposed Contention 7 is a contention of omission because the Applicant failed to discuss the full spectrum of damage states. *Id.* Intervenors incorporate by reference their arguments from Proposed Contention 1. *Id.* Specifically, Intervenors challenge the adequacy of the "total pumping capacity" and the adequacy of the "fire suppression capacity." *Id.* Intervenors also argue that the Applicant does not "discuss compromised water supplies or pumping capacity under all damage states." *Id.*

Staff Response: As explained more fully below, the Staff opposes admission of Proposed Contention 7 because it fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).

Proposed Contention 7 is inadmissible to the same extent as Proposed Contention 1, because Intervenors do not provide a legal basis for the claim that the Applicant must identify

the "full spectrum of damage states." 10 C.F.R. § 2.309(f)(1)(vi). Likewise Proposed Contention 7 is inadmissible to the extent it incorporates Proposed Contention 1 because, as explained in the Staff's response to Proposed Contention 1, it is an impermissible attack on Commission's rule.

Intervenors challenge the adequacy of the total pumping capacity and the adequacy of the fire suppression capacity, but they do not describe how the capacities are inadequate nor do Intervenors provide any factual or expert support for the position that the total pumping capacity or the fire suppression capacity are inadequate. 10 C.F.R. § 2.309(f)(1)(v) and (vi). Intervenors attempt to construe this Proposed Contention as a contention of omission, but where their contention relies on an assertion of inadequate mitigative measures rather than omitted information, Intervenors must provide support for their contention to show why the strategies are inadequate and the Proposed Contention admissible. *See Yankee*, CLI-96-7, 43 NRC at 262.

(b)(4)

Intervenors also assert that "the Applicant does not discuss compromised water supplies nor pumping capacity under all damage states." New Contentions at 21. However, Intervenors do not point to a regulation requiring that the Applicant include such a discussion. While Intervenors have described the information they believe is missing from the Application, they have not provided the legal basis that requires the omitted information to be included, and thus have failed to satisfy 10 C.F.R. § 2.309(f)(1)(vi).

Therefore, Proposed Contention 7 should be dismissed because it does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).

IV. Intervenors Have Failed to Demonstrate That Use of Subpart G Procedures is Appropriate

In 2004 the Commission revised its Rules of Practice for adjudicatory proceedings to "improve the effectiveness and efficiency of the NRC's hearing process, and better focus and use limited resources of all involved." Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2190 (Jan. 14, 2004).[17] The Commission decided that "the greater use of more informal hearing procedures is desirable" and thus revised its rules to expand the use of informal Subpart L procedures. *Id.* at 2206. Accordingly, the Commission stated that Subpart L procedures "would be used . . . in licensing proceedings for the resolution of contentions which do not meet the criteria set forth in section 2.310(d) for use of Subpart G hearing procedures." *Id.* at 2205-06.[18]

Section 2.310(d) provides two situations in which a licensing proceeding must be resolved using formal Subpart G procedures: "resolution of (1) Issues of material fact relating to

---

[17] As stated by the First Circuit Court of Appeals, the NRC had determined that its "existing rules of practice lead to hearings that are cumbersome, unnecessarily protracted, and wasteful of the resources of the parties and the Commission." *Citizen's Awareness Network, Inc. v. United States*, 391 F.3d 338, 352 (1st Cir. 2004) (upholding the NRC's procedures for discovery and cross-examination in licensing proceedings).

[18] Among the primary differences between Subparts G and L are the types of discovery allowed, and the means of presenting evidence at a hearing. Both Subpart G and Subpart L require the parties to provide discovery through the use of mandatory disclosures. *See* 10 C.F.R. §§ 2.336 and 2.704. In a formal Subpart G proceeding, the parties are also permitted to conduct oral depositions and other discovery. *See* 10 C.F.R. §§ 2.705 - 2.709; in contrast, in an informal proceeding under Subpart L, the Staff prepares a hearing file under § 2.1203, but no discovery is permitted apart from the parties' mandatory disclosures. 10 C.F.R. § 2.1203(d). Under Subpart G, oral or written testimony may be presented, and cross-examination is permitted, 10 C.F.R. § 2.711; in contrast, in an informal proceeding, all direct and rebuttal testimony is filed in writing, the Board interrogates the witnesses, and cross-examination is only "permitted, on motion, if the Board deems it necessary for the development of an adequate record." *See* 10 C.F.R. §§ 2.1207 - 1208; *Entergy Nuclear Vermont Yankee L.L.C. & Entergy Nuclear Operations, Inc.*, (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 693 (2004).

the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or (2) issues of motive or intent of the party or eyewitness material to the resolution of the contested matter." 69 Fed. Reg. at 2222 (discussing 10 C.F.R. § 2.310(d)). In explaining these criteria, the Commission stated that the first criterion contains two elements. 69 Fed. Reg. at 2222. The first element is that there is a dispute of material fact concerning a past activity, which includes for example, a disagreement regarding the details of a past conversation. *Id.* The second element is that the credibility of a witness is reasonably expected to be an issue, for example, where there is a question of whether an eye witness accurately describes a past activity. *Id.* But, the Commission stated that "[t]his does not include disputes between parties over the qualifications and professional 'credibility' of expert witnesses who have no first-hand knowledge of the disputed event/facts." *Id.* Finally, the Commission explained that use of Subpart G procedures under the the second criterion is appropriate where a contention requires consideration and resolution of the motive or intent or a witness or party. *Id.*

The Commission further indicated that unless an enforcement proceeding is involved, there is seldom a basis to require Subpart G procedures, because a governmental deprivation of life, liberty or property is not involved. *See id.* at 2205 n.14. Thus, the Commission provided for the use of formal Subpart G procedures in only a limited number of circumstances, "where the application of such procedures are necessary to reach a correct, fair and expeditious

resolution of such matters." 69 Fed. Reg. at 2205.[19] A determination as to which procedures should be used is made on a contention-by-contention basis. 69 Fed. Reg. at 2222.

Here, Intervenors have not demonstrated that Subpart G procedures are appropriate with regard to its seven new proposed contentions. Intervenors anticipate that the Applicant will argue that its Mitigative Strategies Report is adequate and meets the requirements to 10 C.F.R. § 50.54(hh)(2). New Contentions at 22. Intervenors argue that this anticipated position "sets up a material fact issue related to the assumptions abut the full spectrum of damage states" and that live testimony "regarding these contentions is necessary because the credibility of the witnesses sponsoring such testimony will be in issue." *Id.* Therefore, Intervenors request the use of Subpart G hearing procedures. *Id.*

However, Intervenors' statement that their new contentions raise a material issue for which witness credibility will be an issue fails to meet either requirement for the use of Subpart G procedures in this proceeding. *See* New Contentions at 22. First, Intervenors' contentions do not raise a material issue regarding a past event nor do they raise an issue of motive or intent. In addition, the fact that an Applicant is anticipated to support its own application fails to raise an issue of credibility. If an applicant's credibility were questioned every time it supported its own application, then Subpart G procedures would be appropriate in virtually every licensing case; this is contrary to the Commission's intent for the use of Subpart G hearings. The Commission stated that "there is seldom a basis to require Subpart G

---

[19] As stated in the Statement of Consideration, "the Commission has decided to provide for formal, on-the-record hearings using the full panoply of Subpart G procedures and cross-examination in certain *narrowly-prescribed* areas." 69 Fed. Reg. at 2192 (emphasis added).

procedures . . ." and in most licensing cases, Subpart L procedures are appropriate. 69 Fed. Reg. at 2205 n.14. Therefore, because Intervenors have not shown that their Proposed Contentions satisfy the special circumstances enumerated in 10 C.F.R. § 2.310(d), Intervenors' request for the use of Subpart G procedures should be denied.

CONCLUSION

As discussed above, Intervenors do not offer any admissible contentions and have not demonstrated that Subpart G hearing procedures are appropriate. Therefore, Intervenors' proposed contentions should be dismissed and the request for Subpart G hearing procedures should be denied.

/Signed (electronically) by/

Jessica A. Bielecki
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, D.C. 20555-0001
(301) 415-1391
(301) 415-3725 fax
jessica.bielecki@nrc.gov

Executed in Accord with 10 C.F.R. § 2.304(d)

James P. Biggins
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, D.C. 20555-0001
(301) 415-6305
(301) 415-3725 fax
james.biggins@nrc.gov

Dated at Rockville, Maryland
this 8th day of September, 2009

~~Official Use Only - Security-Related Information~~

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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 "NRC STAFF'S ANSWER TO INTERVENORS' CONTENTIONS AND REQUEST FOR A SUBPART G HEARING" have been served upon the following persons by Electronic Information Exchange this 8th day of September, 2009:

Administrative Judge
Michael M. Gibson
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: Michael.Gibson@nrc.gov)

Office of Commission Appellate Adjudication
Mail Stop O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail:OCAAmail@nrc.gov

Administrative Judge
Gary S. Arnold
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: Gary.Arnold@nrc.gov)

Office of the Secretary
ATTN: Docketing and Service
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

Administrative Judge
Randall J. Charbeneau
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: Randall.Charbeneau@nrc.gov)

Robert V. Eye, Esq.
Counsel for the Intervenors
Kauffman & Eye
Suite 202
112 SW 6th Ave.
Topeka KS 66603
bob@kauffmaneye.com

Steven P. Frantz, Esq.
Stephen J. Burdick, Esq.
Alvin Gutterman, Esq.
John E. Matthews, Esq.
Counsel for the Applicant
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004
E-mail:
sfrantz@morganlewis.com
sburdick@morganlewis.com
agutterman@morganlewis.com
jmatthews@morganlewis.com

/signed (electronically) by/

Jessica Bielecki
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, D.C. 20555-0001
(301) 415-1391
(301) 415-3725 fax
jessica.bielecki@nrc.gov