

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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In the Matter of  
South Texas Project Nuclear Operating Co.  
Application for the South Texas Project  
Units 3 and 4  
Combined Operating License

Docket Nos. 52-012, 52-013

February 24, 2010

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INTERVENORS CONSOLIDATED REPLY TO APPLICANT'S AND STAFF'S RESPONSES TO  
THE APPEAL OF THE ASLB'S ORDER OF JANUARY 29, 2010

The Intervenors hereby offer the following brief in reply to the Applicant's and Staff's response briefs in this appeal.

**This Appeal is Properly Before the Commission**

Applicant and Staff argue that this appeal is not properly before the Commission because it does not meet the requirements of 10 C.F.R. § 2.311 and 10 C.F.R. § 2.341.<sup>1</sup> The subject contentions were filed subsequent to the ASLB's Order that mooted the original contention that raised the absence of mitigative strategies required under 10 C.F.R. § 52.80 and § 50.54(hh)(2).<sup>2</sup> Based on the Board's Order and subsequent to the Intervenors' access to the Applicant's mitigative strategies and NEI 06-12 the contentions were filed on August 14, 2009. The proposed contentions included a request for hearing.<sup>3</sup>

The ASLB acted on the proposed contentions as a discrete segment of the COLA adjudication in its Order that ruled on their admissibility and the request for a hearing under Subpart G. In the ASLB's

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<sup>1</sup> Staff brief, pp. 7-8, Applicant brief, pp. 5-7.

<sup>2</sup> Board Order, August 27, 2009, p.11.

<sup>3</sup> 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, August 14, 2009, p. 22.

January 29, 2010, Order it specified that the decision was subject to appeal under 10 C.F.R. § 2.311.<sup>4</sup> This ASLB specification was consistent with the view that the proposed fires and explosions contentions were not inherently linked to the Petition for Intervention and were interpreted by the Board as if the contentions were a separate stand-alone petition for intervention and request for hearing.<sup>5</sup>

Staff and Applicant rely on *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station) CLI-06-24, 64 NRC 111 (2006). In *Oyster Creek* the appeal involved an order that refused to allow supplementation of an admitted contention.<sup>6</sup> In the instant case, the Board's Order denied all the proffered fires and explosions contentions and denied a request for hearing thereon. As a result of the Board's Order there are no pending fires and explosions contentions. In *Oyster Creek*, subsequent to the denial of the motion to supplement an extant contention and to add two new contentions, the Intervenor still had its original drywell liner contention pending.<sup>7</sup> But in the instant matter, assuming that the fires and explosions contentions are viewed as the functional equivalent of a separate petition and request for hearing, as the ASLB apparently did, an appeal under 10 C.F.R. § 2.331 is appropriate because there are no fires and explosions contentions now pending before the Board.

The notice of appeal herein did not specify 10 C.F.R. § 2.341 because the prerequisites of that regulation do not address the circumstances related to the Board's Order that is the subject of this appeal. The Board's Order is appealable because all the proffered contentions were dismissed and the request for a hearing was denied as a result.<sup>8</sup> The Board's Order is final as to the merits of the fires and explosions contentions and the request for hearing and is therefore, subject to appeal under 10 C.F.R. § 2.311.<sup>9</sup>

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<sup>4</sup> Board order, Jan.29, 2010, p. 33.

<sup>5</sup> 10 C.F.R. § 2.311 allows an appeal only if all contentions and/or the request for hearing is denied.

<sup>6</sup> *Oyster Creek*, 64 NRC at 125.

<sup>7</sup> 64 NRC at 119-120

<sup>8</sup> The Board's Order at p. 33 dismissed the proffered contentions without prejudice but preserved the right of the Intervenor to file new or amended contentions depending on whether the information in ISG-016 would support such.

<sup>9</sup> Intervenor recognize the policy against piecemeal appeals. *Exelon Generating Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 466 (2004) Depending on the outcome of the related Staff appeal of the Board's Order concerning disclosure of ISG-016 and any additional contentions that are filed as a result of disclosure, there is the possibility that further appeals on fires and explosions contentions could again come before the Commission. Intervenor bring this appeal on the premise that the Commission may reverse the Board's Order on the ISG-016 and foreclose disclosure and that such ruling would preclude filing any additional/amended fires and

**The ASLB Order Ratified the Applicant's and Staff's Position that there is no Requirement that the Fires and Explosions Mitigative Strategies be Demonstrably Effective**

The Board's Order essentially ratified the position of the Applicant and Staff that the fires and explosions strategies are sufficient even though there is no possible way to judge whether such would be demonstrably effective under any damage state. Accordingly, the same arguments that supported the contentions are germane to the appeal.<sup>10</sup> The Board's error was in accepting the mitigative strategies without any showing that such would be demonstrably effective. This basis provides "sufficient information and cogent argument" that is adequate to inform the Commission, Staff and Applicant about the issues on appeal.<sup>11</sup>

Staff argues that the appeal makes only general arguments and infers that the substance of the Intervenor's arguments on appeal is unknown.<sup>12</sup> And Applicant argues that repeating arguments on appeal that were made before the Board decision is enough to affirm the Board's decision.<sup>13</sup> Applicant cites to *In the Matter of South Carolina Electric and Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI 01-10 (Jan.7, 2010) for the point that generalized claims made before the Board repeated on appeal justifies affirming the Board's decision.<sup>14</sup> The Intervenor's have been specific in their arguments regarding the Applicant's mitigative strategies that address fires and explosions throughout this litigation, including this appeal. The mitigative strategies' deficiencies are not based on generalized arguments but rather focus on the very specific argument that there is a legal duty for the Applicant to establish that the mitigative strategies will achieve the regulatory objectives specified in 10 C.F.R. § 52.80(d). Staff's argument infers it does not know what Intervenor's are arguing on appeal and disregards both the specific arguments advanced before the Board and in this appeal. Applicant's argument ignores the specificity of Intervenor's arguments regarding the fires and explosions regulatory requirements throughout the case.

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explosions contentions.

<sup>10</sup> Intervenor's are both repeating arguments raised previously and identifying errors in the board's decision.

<sup>11</sup> See *Advanced Medical Systems, Inc.*, CLI-94-6, 39 NRC 285, 297 (1994).

<sup>12</sup> Staff brief, pp.5-6.

<sup>13</sup> Applicant brief, pp.7-8.

<sup>14</sup> Applicant brief, p.8.

There is nothing “diffuse” about Intervenors’ argument, for example, that specific language in the SOC requires that the mitigative strategies be demonstrably effective. Nor are Intervenors making “generalized” arguments in pointing out that Applicant has not offered any evidence to support its assertion that merely adopting the template of mitigation measures in NEI 06-12 is equivalent to demonstrating that the measures are effective.

### **The Legal Grounds for the Contentions are Adequately Specified by Intervenors**

The fires and explosions contentions proffered to the Board are supported by specific legal grounds in both the contentions and the appellate brief. First, Intervenors contended that as contentions of omission, the contentions were admissible because they argued the mitigative strategies were not demonstrably effective.<sup>15</sup> Intervenors also argued that demonstrations of effectiveness are required in order to show by a preponderance of the evidence that the strategies protect the public health and safety and environment.<sup>16</sup> Intervenors further argued that failure to do so violates the requirements of the Atomic Energy Act, 42 U.S.C. § 2133(d). Furthermore, the Intervenors offered the legal argument that to not require a demonstration of effectiveness of the mitigative strategies creates a loophole that vitiates the Commission’s purposes in adopting 10 C.F.R. § 52.80(d) and 50.54(hh)(2).<sup>17</sup> These grounds were specified in proceedings before the Board and were more than adequate to inform the Board Applicant and Staff of the Intervenors’ legal theories.

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<sup>15</sup> Intervenors’ Appeal Brief, p. 5 and 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), September 15, 2009, p. 4 “This omission of information makes it impossible to determine whether the mitigative measures would be effective.”

<sup>16</sup> Intervenors’ Appeal Brief, pp. 10, 12, 18, Intervenors Contentions, p. 13, Intervenors’ Response, p. 6

<sup>17</sup> Intervenors’ Appeal Brief, p. 12, n.36 citing *Mackamaux v. Day Kimball Hosp.*, 654 F.Supp. 2d 112, (D. Conn., 2009)

**Applicant's Argument that its Mitigative Measures will Address a "Myriad" of LOLA Events is Unsupported by any Evidence**

Applicant argues that its mitigative measures are flexible and "able to mitigate a myriad of LOLA events (including aircraft impacts) without need to determine damage states or damage footprints."<sup>18</sup> Applicant's sole support for this assertion is the guidance in NEI-06-12.<sup>19</sup> Throughout the litigation of the fires and explosions contentions neither the Applicant nor Staff offered any evidence to support the claims that the mitigative measures would be effective at mitigating any particular LOLA event let alone something on the magnitude of an aircraft impact(s). And reliance on NEI 06-12 is problematic in this regard since it does not specifically address aircraft impacts.<sup>20</sup> What is the "myriad" of LOLA events to which Applicant refers? Does the "myriad" include LOLAs that require simultaneous suppression of multiple major fires in the aftermath of multiple major explosions while also attempting to supply makeup water to the reactor core and spent fuel pool? Applicant does not say whether its mitigative strategies would be effective in such a scenario or any other circumstances and the Board did not require any such demonstration of effectiveness.

**Staff's Argument that the Board Properly Determined Mitigative Measures Required Under 10 C.F.R. § 50.54(hh)(2) are not Required to be Demonstrably Effective Creates an Irrational Loophole**

Staff argues that the Board properly rejected Intervenors' argument that mitigative measures must be demonstrably effective based on the Statement of Considerations in the Federal Register notice regarding the fires and explosions regulations.<sup>21</sup> Staff infers that any showing of effectiveness is limited to the requirements of 10 C.F.R. § 50.54(hh)(1).<sup>22</sup> But this assertion overlooks the following:

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<sup>18</sup> Applicant brief, p.9.

<sup>19</sup> *Id.*

<sup>20</sup> A word search of NEI 06-12 discloses no reference to aircraft impacts or any other specific initiating event.

<sup>21</sup> Staff brief, pp.10-12.

<sup>22</sup> *Id.*

In light of the Commission's view that effective mitigation of the effects of events causing large fires and explosions (including the impact of a large commercial aircraft) should be provided through operational actions, the Commission believes that the mitigation of the effects of such impacts through design should be regarded as a safety enhancement which is not necessary for adequate protection. Therefore, the aircraft impact rule—unlike the § 50.54(hh)—is regarded as a safety enhancement which is not necessary for adequate protection.<sup>23</sup>

Hence, the Board's assertion that the Commission's Statement of Considerations somehow excuses demonstrations of effectiveness of mitigative strategies is flatly contradicted by the above from the SOC. The SOC does not exempt § 50.54(hh)(2) from the requirement of effectiveness. And the fact that the Commission considers the fires and explosions regulatory requirements be accomplished through "operational actions" reinforces the argument that the strategies be demonstrably effective to provide adequate protection. Are the operational actions derived from the mitigative strategies adequate and effective to address LOLA events? There is no way to answer this question because the Board deemed the mitigative strategies acceptable without a showing of effectiveness under any damage state.

Staff argues that the Board's decision is supported because current operating reactor licensees are excused from adopting mitigative strategies without any consideration of damage states.<sup>24</sup> The Board's Order notes that current licensees developed mitigative strategies based on NEI 06-12 and the interim staff guidance.<sup>25</sup> First, whether the undisclosed interim staff guidance for new reactors is itself a proper and legally defensible basis for making regulatory decisions is problematic because Intervenors have not been able to dislodge it from the Staff.<sup>26</sup> Second, this case is the first time regulatory requirements of 10 C.F.R. § 52.80 and § 50.54(hh)(2) have been the subject of interpretations as applied to a COL applicant. As a case of first impression, the Commission is now confronted with interpreting the fires and explosions regulations and determining whether the regulations have been properly applied in this case. Accordingly, that current licensees are excused from demonstrating that their mitigation strategies are effective does

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<sup>23</sup> 74 Fed. Reg. 13926, 13957. (emphasis added)

<sup>24</sup> Staff brief, pp.11-12.

<sup>25</sup> Board Order, p. 22, n. 98.

<sup>26</sup> See Staff Appeal of LBP-10-02, February 9, 2010

not bind the Commission particularly since this is the first appeal that involves the fires and explosions regulations for COL applicants.<sup>27</sup>

Staff argues that the Board was correct in rejecting Intervenors' assertion that a description of the damage states to which the strategies apply is required to judge the effectiveness of the strategies. Staff contends there was no legal basis for this assertion.<sup>28</sup> The Board's Order allows the mitigative strategies to be adopted without any showing of effectiveness. This creates an unreasonable and irrational loophole that permits the Applicant to submit any set of mitigative strategies and such would be deemed satisfactory if demonstrably "flexible," irrespective of whether such are demonstrably "effective" in meeting the requirements of 10 C.F.R. § 52.80(d) and § 50.54(hh)(2).<sup>29</sup>

## Conclusion

The Intervenors urge that the Order of the ASLB dismissing MS-1, MS-3 and MS-6 be reversed and that the Commission issue an Order on remand to admit the contentions for adjudication.

Respectfully submitted,

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<sup>27</sup> Questions of law are reviewed under a *de novo* standard. *In the Matter of Amergen Energy Co., LLC* (Oyster Creek License Renewal), 69 N.R.C. 235, 259 (2009)

<sup>28</sup> Staff brief, p.10

<sup>29</sup> *Mackamaux v. Day Kimball Hosp.*, 654 F. Supp. 2d 112, (D. Conn., 2009).

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 24, 2010 a copy of the "Intervenors' Consolidated Reply to Applicant's and Staff's Responses to the Appeal of ASLB's Order of January 29, 2010" was served by the Electronic Information Exchange on the following recipients:

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