

**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-COL
(South Texas Project Units 3 and 4))	52-013-COL
	July 12, 2010

**STP NUCLEAR OPERATING COMPANY’S
REQUEST FOR LEAVE TO FILE AND MOTION FOR RECONSIDERATION
OF THE BOARD’S DECISION TO ADMIT CONTENTION CL-2**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(e), STP Nuclear Operating Company (“STPNOC”), applicant in the above-captioned proceeding, hereby seeks leave of the Atomic Safety and Licensing Board (“Board”) to file this motion for reconsideration of the Board’s July 2, 2010 decision in LBP-10-14 to admit in part proposed Contentions CL-2 through CL-4 (which have been reformulated and redesignated as Contention CL-2).¹ Contention CL-2 alleges that STPNOC’s estimation of replacement power costs in the evaluation of severe accident mitigation alternatives (“SAMAs”) in Environmental Report (“ER”) Section 7.5S is erroneous.²

STPNOC respectfully submits that the compelling circumstances discussed in this Motion warrant reconsideration of the Board’s admissibility ruling and rejection of Contention CL-2. Specifically, LBP-10-14 does not address STPNOC’s argument that all of the severe accident contentions (including the contentions on replacement power costs) should have been

¹ *S. Tex. Project Nuclear Operating Co.* (South Texas Project Units 3 & 4), LBP-10-14, 72 NRC ___, slip op. at 24-33 (July 2, 2010) (“LBP-10-14”). The procedural history of this proceeding is discussed on pages 2 to 4 of LBP-10-14.

² *Id.* at 30.

dismissed because they involve accident scenarios that are “remote and speculative.” As such, the admission of Contention CL-2 represents a clear and material error under the National Environmental Policy Act (“NEPA”) that renders the decision in LBP-10-14 invalid.

II. APPLICABLE LEGAL STANDARDS

As provided in 10 C.F.R. § 2.323(e), motions for reconsideration may be filed with leave of the Board “upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.”

The “compelling circumstances” standard is a high standard.³ Using that standard, the Nuclear Regulatory Commission (“NRC” or “Commission”) has stated on several occasions that reconsideration is appropriate where a party “brings decisive new information” to the attention of the decisionmaker or “demonstrates a fundamental . . . misunderstanding of a key point.”⁴

As discussed below, compelling circumstances are present here. In particular, STPNOC expressed a fundamental objection to all of the proposed severe accident contentions, including proposed Contentions CL-2 through CL-4 - - namely, that the contentions are predicated upon events that are remote and speculative under NEPA and therefore are not material to the NRC’s decision. Apparently, the Board did not appreciate or understand that STPNOC was taking this

³ As stated by the Commission when it revised the rule, the “compelling circumstances” standard “is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier. In the Commission’s view, reconsideration should be an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.” Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004).

⁴ *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 (2004). Although the Commission denied the motion for reconsideration in *National Enrichment Facility*, it articulated that “fundamental . . . misunderstanding of a key point” is a “compelling circumstance” under the standard adopted in 10 C.F.R. § 2.323(e). *Id.* at 622 n.12. See also *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-15, 71 NRC ___, slip op. at 1-2 (June 17, 2010) (denying a motion for reconsideration because the movant did “not demonstrate any material error or fundamental misunderstanding on our part”).

position with respect to proposed Contentions CL-2 through CL-4, because the Board in LBP-10-14 did not address STPNOC's position. Since Contention CL-2 involves events that are remote and speculative, the admission of Contention CL-2 was a clear error and material error under NEPA.⁵ Furthermore, this error has resulted in a manifest injustice to STPNOC. If the Board had addressed STPNOC's position and dismissed proposed Contentions CL-2 through CL-4, there would be no admitted contentions left in this proceeding, and the proceeding would assume a fundamentally different character.⁶

III. BACKGROUND

On April 21, 2009, the Intervenors filed a Petition for Intervention and Request for Hearing, which included Contention 21. This contention claimed that the ER for STP Units 3 and 4 failed to consider the impacts from severe radiological accident scenarios on the operation of other units at the STP site.⁷ The Board admitted Contention 21 on August 27, 2009.⁸

On November 11, 2009, STPNOC submitted a notification to the Board regarding Contention 21.⁹ That notification informed the Board that STPNOC had submitted a letter to the NRC identifying revisions to the ER for STP Units 3 and 4.¹⁰ Specifically, STPNOC had created a new ER Section 7.5S that evaluates the impacts that a design basis accident or severe accident

⁵ In *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-13, 65 NRC 211, 214 (2007), the Commission suggested that a motion for reconsideration may be appropriate when a party identifies a decision that is inconsistent with NEPA.

⁶ The Intervenors have submitted proposed contentions related to the draft environmental impact statement, and STPNOC and the NRC staff have objected to all of those proposed contentions. If the Board were to agree with the positions of STPNOC and the NRC staff, and to reject those proposed contentions, this contested proceeding before the Board would be at an end.

⁷ LBP-10-14, slip op. at 9.

⁸ *S. Tex. Project Nuclear Operating Co.* (South Texas Project Units 3 & 4), LBP-09-21, 70 NRC ___, slip op. at 36-39 (Aug. 27, 2009).

⁹ Letter from S. Burdick, Counsel for STPNOC, to the Board, Notification of Filing Related to Contention 21 (Nov. 11, 2009) ("Notification Letter").

¹⁰ Attachment to Notification Letter, Letter from S. Head, STPNOC, to NRC, Proposed Revision to Environmental Report (Nov. 10, 2009) ("ER Letter").

at one of the new or existing units at the STP site would have on the other units at the site.¹¹ Included within Section 7.5S was Section 7.5S.5, which provided an evaluation of SAMAs for STP Units 3 and 4 based upon a severe accident at one of the four STP units that resulted in a service disruption of the co-located units. That evaluation accounted for the replacement power costs associated with the service disruption. On November 30, 2009, STPNOC requested that the Board dismiss Contention 21 as moot based on the new ER Section 7.5S.¹² On December 22, 2009, the Intervenors sought admission of four new contentions related to ER Section 7.5S, Contentions CL-1 through CL-4.¹³ Contentions CL-2, CL-3, and CL-4 alleged deficiencies in STPNOC's quantification of replacement power costs following a shutdown of multiple STP units due to a severe accident event.¹⁴ STPNOC's Answer opposed admission of Intervenors' proposed revisions to Contention 21, as well as the new Contentions CL-1 through CL-4.¹⁵

On July 2, 2010, the Board issued LBP-10-14. Among other things, LBP-10-14 dismisses Contention 21 as moot and rejects Contention CL-1.¹⁶ LBP-10-14 also consolidates Contentions CL-2, CL-3, and CL-4 into one admitted contention - - named Contention CL-2.¹⁷ Contention CL-2, as admitted, states: "The Applicant's calculation in ER Section 7.5S of replacement power costs in the event of a forced shutdown of multiple STP Units is erroneous

¹¹ ER Letter, Attachment at 1-9.

¹² See Applicant's Motion to Dismiss Contention 21 as Moot at 1 & 5 (Nov. 30, 2009).

¹³ See Intervenors' Contentions Regarding Applicant's Proposed Revision to Environmental Report Section 7.5S and Request for Hearing (Dec. 22, 2009).

¹⁴ LBP-10-14, slip op. at 24.

¹⁵ Applicant's Answer Opposing New and Revised Contentions Regarding Environmental Report Section 7.5S, at 5-9 (Jan. 22, 2010) ("STPNOC Answer")

¹⁶ LBP-10-14, slip op. at 9-24.

¹⁷ *Id.* at 24-33.

because it underestimates replacement power costs and fails to consider disruptive impacts, including ERCOT market price spikes.”¹⁸

IV. DISCUSSION

STPNOC requests reconsideration of LBP-10-14 because that Order does not address and reflects a fundamental misunderstanding of STPNOC’s argument on pages 4 to 9 of its Answer that all of the severe accident contentions should have been dismissed because they involve accidents that are “remote and speculative” under NEPA.¹⁹ The admission of Contention CL-2 represents a clear and material error under NEPA.

STPNOC’s Answer raised a generic objection to the all of the proposed severe accident contentions (including proposed Contentions CL-2 through CL-4) because they were predicated on severe accidents that have a probability of occurrence that is less than 1×10^{-6} per year. Such accidents are “remote and speculative” and therefore do not need to be evaluated under NEPA.²⁰ Because “remote and speculative” accidents do not need to be evaluated under NEPA, there is no legal requirement for an evaluation of alternatives for mitigating the environmental impacts of such accidents.²¹ Accordingly, the resulting replacement power costs in Contention CL-2 from the forced shutdown of the co-located STP units also do not need to be evaluated. The Board’s order in LBP-10-14 never addressed this issue, and apparently misunderstood that STPNOC was taking this position with respect to proposed Contentions CL-2 through CL-4.

¹⁸ *Id.* at 30.

¹⁹ STPNOC’s Answer clearly stated that it objected to “all of the proposed revisions and the new contentions” because they involved events that are remote and speculative. *See* STPNOC’s Answer at 4. Similar statements appear on pages 8 and 9 of STPNOC’s Answer.

²⁰ STPNOC’s Answer at 5-9.

²¹ In this regard, *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 739-41 (3d Cir. 1989) accepted the proposition that NEPA does not require consideration of alternatives to mitigate risks that are remote and speculative, but ruled that the NRC had not decided on a generic basis that severe accidents at nuclear plants were remote and speculative. *See* STPNOC’s Answer at 7 n.28.

As discussed in STPNOC's Answer to all of the proposed severe accident contentions, NEPA is subject to a "rule of reason" and does not require consideration of "remote and speculative" impacts.²² Additionally, the Commission has made clear that "low probability is the key to applying NEPA's rule of reason test to contentions that allege that a specified accident scenario presents a significant environmental impact that must be evaluated."²³ Accordingly, the Commission stated that "[i]f the accident sought to be considered is sufficiently unlikely that it can be characterized fairly as remote and speculative, then consideration under NEPA is not required as a matter of law."²⁴

As was recently held by the licensing board in the *Calvert Cliffs* combined operating license proceeding, an environmental report for a new nuclear plant does not need to evaluate the impacts of external events that have a low probability of occurrence.²⁵ The board stated that, under NEPA's rule of reason, a probability of 10^{-6} per year is the "threshold above which accident scenarios must be evaluated for NEPA consideration."²⁶ Similarly, another licensing board in the *Comanche Peak* combined operating license proceeding recently rejected proposed contentions related to certain severe accident scenarios that had a probability of less than 10^{-6} per year.²⁷ Additionally, in this proceeding, the Board ruled in LBP-10-14 that "remote and

²² STPNOC Answer at 5; see *Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 44 (1989) (citing *Limerick Ecology Action v. NRC*, 869 F.2d 719, 739 (3d Cir. 1989)).

²³ STPNOC Answer at 7; *Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-90-7, 32 NRC 129, 131 (1990).

²⁴ STPNOC Answer at 7; *Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-90-4, 31 NRC 333, 335 (1990).

²⁵ STPNOC Answer at 8; *Calvert Cliffs 3 Nuclear Project, LLC* (Combined License Application for Calvert Cliffs Unit 3), LBP-09-04, 69 NRC 208, 209 (2009).

²⁶ STPNOC Answer at 8; *Calvert Cliffs*, LBP-09-04, 69 NRC at 209.

²⁷ *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), LBP-10-10, 71 NRC ___, slip op. at 25-28 & 32-34 (June 25, 2010).

speculative” impacts do not need to be considered,²⁸ and in fact rejected proposed Contention CL-1 Parts A and B in part based upon the low probability of the events at issue.²⁹

It is undisputed that the probability of a severe accident at an Advanced Boiling Water Reactor (“ABWR”) at STP Units 3 and 4 is well below this threshold. As discussed in ER Section 7.5S, the large release frequency (“LRF”) from internal events at one of the new ABWR units is 2.2×10^{-8} per year and the core damage frequency (“CDF”) is 1.6×10^{-7} per year from internal events.³⁰ As a result, a severe accident at STP Units 3 and 4 is remote and speculative and need not be considered under NEPA.³¹ For the same reason, STPNOC’s SAMA analysis for Units 3 and 4 does not need to address accidents that are remote and speculative. Because proposed Contentions CL-2 through CL-4 were predicated on events that do not need to be evaluated under NEPA, they all raise issues that are not material to this proceeding and accordingly LBP-10-14 should have rejected those proposed contentions pursuant to 10 C.F.R. § 2.309(f)(1)(iv). However, LBP-10-14 never addressed this issue as presented on pages 4 to 9 of STP’s Answer. This is fundamental misunderstanding of STP’s position, and the admission of Contention CL-2 represents a clear and material error under NEPA.

Although not required by NEPA given the low probability of severe accidents in an ABWR, ER Section 7.5S.5, and Tables 7.5S-1 and 7.5S-2 provide a SAMA analysis, including

²⁸ LBP-10-14, at 8 & 17 n.91.

²⁹ *Id.* at 17 & 20.

³⁰ External events and low power and shutdown events are small contributors to severe accident risk in an ABWR at STP. *See* LBP-10-14, at 20; ER Letter, Attachment at 4.

³¹ The frequency of severe accidents at STP Units 1 and 2 is higher. However, as discussed in the ER Letter, Attachment at 7, “[n]one of the severe accident mitigation design alternatives considered for the ABWR would be cost effective and mitigate the potential impacts (contamination and down time) from a large release severe accident at the existing units.” Thus, from the perspective of the SAMA analysis for Units 3 and 4, severe accidents originating at Units 1 and 2 are not material. Additionally, a SAMA analysis for Units 1 and 2 is outside the scope of this proceeding. *See* LBP-10-14, at n. 140 (“[A]ny allegations involving only STP Units 1 and 2 are outside the scope of this proceeding and cannot be considered by this Board, which is solely concerned with the licensing of proposed STP Units 3 and 4.”) In that regard, NEPA does not require that an evaluation be performed for the purpose of mitigating *economic* impacts on Units 3 and 4.

an assessment of economic impacts associated with extended outages of the STP co-located units.³² However, given that the accident scenarios in question are remote and speculative, this supplemental information is not required. Thus, even if there may be a dispute regarding the way replacement power costs are calculated in ER Section 7.5S.5, that dispute is not material to an issue that must be legally considered. As the licensing board recently stated in the *Shearon Harris* combined license proceeding, if an environmental report includes cost information not required by regulations, a contention challenging that information is not admissible.³³ This holds true even where the NRC Staff expects the cost information to be submitted in the ER; “the mere fact that the Staff desires that information does not cause the contention to become admissible.”³⁴

In summary, LBP-10-14 does not consider the above arguments with respect to admitted Contention CL-2. As discussed above, had this argument been considered, Contention CL-2 would not have been admitted. This omission provides the “compelling circumstances, such as the existence of a clear and material error . . . that renders the decision invalid” in accordance with 10 C.F.R. § 2.323(e). Furthermore, reconsideration of this argument is appropriate here because the Board’s ruling “demonstrates a fundamental . . . misunderstanding of a key point.”³⁵ For these reasons, STPNOC requests that the Board reconsider LBP-10-14 and reject Contention CL-2.

V. CONCLUSION

STPNOC respectfully submits that reconsideration of the Board’s decision to admit Contention CL-2 is warranted. Had LBP-10-14 considered STPNOC’s argument that the severe

³² See ER Letter, Attachment at 6-7 & 9.

³³ *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Plant, Units 2 & 3), LBP-08-21, 68 NRC 554, 576-77 (2008), *aff’d* CLI-10-09, 71 NRC ___, slip op. at 22-28 (Mar. 11, 2010).

³⁴ *Shearon Harris*, LBP-08-21, 68 NRC at 577.

³⁵ *National Enrichment Facility*, CLI-04-35, 60 NRC at 622.

accidents at STP Units 3 and 4 are “remote and speculative” under NEPA, then Contention CL-2 would not have been admitted. For these reasons, Contention CL-2 should be rejected.

Respectfully submitted,

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Counsel for STP Nuclear Operating Company

Dated in Washington, D.C.
this 12th day of July 2010

CERTIFICATIONS

I certify that I have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful.

/s/ Steven P. Frantz

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(South Texas Project Units 3 and 4))	July 12, 2010

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2010, a copy of “STP Nuclear Operating Company’s Request for Leave to File and Motion for Reconsideration of the Board’s Decision to Admit Contention CL-2” was served by the Electronic Information Exchange on the following recipients:

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