

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	Docket Nos. 52-012-COL
STP NUCLEAR OPERATING COMPANY)	52-013-COL
)	
(South Texas Project Units 3 and 4))	July 29, 2010
)	

**STP NUCLEAR OPERATING COMPANY’S ANSWER SUPPORTING THE NRC
STAFF MOTION FOR SUMMARY DISPOSITION OF CONTENTION CL-2**

Pursuant to 10 C.F.R. § 2.1205(b) and Section II.G.3 of the October 20, 2009 Initial Scheduling Order, STP Nuclear Operating Company (“STPNOC”), applicant in the above-captioned proceeding, hereby submits this Answer supporting the Nuclear Regulatory Commission (“NRC”) Staff’s July 22, 2010 Motion for Summary Disposition of Contention CL-2 (“Staff Motion”).

I. Background

STPNOC has submitted a combined license (“COL”) application for South Texas Project (“STP”) Units 3 and 4. That application references the Advanced Boiling Water Reactor (“ABWR”) design certification rule, which is contained in 10 C.F.R. Part 52, Appendix A.¹

On July 2, 2010, the Atomic Safety and Licensing Board (“Board”) admitted Contention CL-2.² Contention CL-2 alleges under the National Environmental Policy Act (“NEPA”) that

¹ STP Combined License Application, Part 1, at 1.0-1 (rev. 3 Sept. 16, 2009), *available at* ADAMS Accession No. ML092931176.

² *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). The procedural history of this proceeding is discussed on pages 2 to 4 of LBP-10-14.

STPNOC's estimation of replacement power costs in the evaluation of severe accident mitigation design alternatives ("SAMDA") in Environmental Report ("ER") Section 7.5S is erroneous.³

The Staff Motion demonstrates that summary disposition of Contention CL-2 is warranted because all environmental issues regarding SAMDAs are resolved in this proceeding by the ABWR design certification rule. As discussed below, STPNOC agrees that there is no genuine issue of material fact regarding Contention CL-2 and that it should be dismissed as a matter of law.

II. There Is No Genuine Issue of Material Fact Regarding Contention CL-2 and the Contention Should Be Dismissed as a Matter of Law

In ruling on a motion for summary disposition, a licensing board is directed to apply the standards for summary disposition set forth in 10 C.F.R. § 2.710(d)(2),⁴ which states that summary disposition is warranted if "there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law."

The applicant for design certification of the ABWR submitted a SAMDA evaluation in the form of a technical support document. The NRC reviewed and accepted that SAMDA evaluation during the design certification rulemaking proceeding. As explained in the Staff Motion, the ABWR design certification rule at 10 C.F.R. Part 52, Appendix A, Section VI provides:

B. The Commission considers the following matters resolved within the meaning of 10 CFR 52.63(a)(5) in subsequent proceedings for issuance of a combined license . . . involving plants referencing this appendix: . . .

7. All environmental issues concerning severe accident mitigation design alternatives associated with the information in the NRC's final environmental assessment for the U.S. ABWR design and

³ *Id.* at 30.

⁴ *See* 10 C.F.R. § 2.1205(c).

Revision 1 of the technical support document for the U.S. ABWR, dated December 1994, for plants referencing this appendix whose site parameters are within those specified in the technical support document.

Thus, the SAMDA evaluation in the ABWR design certification rulemaking has finality. As shown in the Staff Motion, Section VI.B.7 of the ABWR design certification rule applies to STP Units 3 and 4, and therefore all environmental issues concerning SAMDAs are resolved.⁵

In addition to the points made in the Staff Motion, STPNOC would like to draw the Board's attention to the following legal principles. First, generic NEPA issues, such as the SAMDA evaluation for the ABWR, may be resolved by rulemaking. The Commission has stated: "By longstanding practice, repeatedly upheld on judicial review, the Commission has considered and addressed generically through rulemaking specific environmental (or safety) issues that otherwise would have been addressed in an individual licensing proceeding."⁶ The U.S. Supreme Court has approved the Commission's resolution of generic NEPA issues through rulemaking, stating that "[t]he generic method chosen by the agency is clearly an appropriate method of conducting the hard look required by NEPA. . . . Administrative efficiency and consistency of decision are both furthered by a generic determination of these effects without needless repetition of the litigation in individual proceedings."⁷ This principle has also been applied in numerous decisions by the U.S. Court of Appeals.⁸ Therefore, the Commission's

⁵ Absent a waiver, issues such as these that have been resolved through rulemaking cannot be challenged in a combined license proceeding. See 10 C.F.R. §§ 52.63(a)(5) & 2.335. The Intervenor has not sought a waiver.

⁶ *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 14 (2001) (citing *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87 (1983)).

⁷ *Balt. Gas & Elec.*, 462 U.S. at 101 (upholding the use of rulemaking to resolve issues related to the environmental impacts of the uranium fuel cycle).

⁸ See, e.g., *Kelley v. Selin*, 42 F.3d 1501, 1512 (6th Cir. 1995); *Minnesota v. NRC*, 602 F.2d 412, 416-19 (D.C. Cir. 1979); *Ecology Action v. AEC*, 492 F.2d 998, 1002 (2d Cir. 1974).

generic resolution of SAMDA issues through the ABWR design certification rulemaking was legally permissible.

Second, the fact that STPNOC submitted a SAMDA evaluation in ER Section 7.5S does not create a litigable issue regarding SAMDAs. As the licensing board recently stated in the *Shearon Harris* combined license proceeding, if an environmental report includes information not required by regulations, a contention challenging that information is not admissible.⁹

Because all of the environmental issues concerning SAMDAs have been resolved through the ABWR design certification rule, no genuine issue as to any material fact on Contention CL-2 remains. Thus, the Staff and STPNOC are entitled to a decision as a matter of law. As the Commission recently explained, “[o]nly disputes over facts that might affect the outcome’ of a proceeding would preclude summary disposition.”¹⁰ The U.S. Supreme Court similarly has stated that “[f]actual disputes that are irrelevant or unnecessary will not be counted.”¹¹ Given the provision in Section VI.B.7 of the ABWR design certification rule, any remaining disputes in Contention CL-2 are rendered irrelevant and do not affect the outcome of this proceeding. Therefore, Contention CL-2 should be dismissed.

III. Conclusions

In summary, STPNOC supports the Staff Motion because there is no genuine issue as to any material fact remaining for Contention CL-2 and the Staff and STPNOC are entitled to a decision as a matter of law. Additionally, STPNOC’s July 12, 2010 Motion for Reconsideration

⁹ *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).

¹⁰ *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC ___, slip op. at 12 (Mar. 26, 2010) (*quoting Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)).

¹¹ *Anderson*, 477 U.S. at 248.

of the Board's Decision to Admit Contention CL-2 provides an independent basis for dismissing Contention CL-2. For these reasons, Contention CL-2 should be dismissed.

Respectfully submitted,

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Dated in Washington, D.C.
this 29th day of July 2010

CERTIFICATIONS

I certify that I have made a sincere effort to make myself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the Staff Motion. STP Nuclear Operating Company supports the Staff Motion.

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