

August 2, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S ANSWER IN OPPOSITION
TO APPLICANT'S MOTION FOR RECONSIDERATION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(e) the staff of the United States Nuclear Regulatory Commission (Staff) files this answer to STP Nuclear Operating Company's (Applicant's) Request for Leave To File and Motion For Reconsideration of the Board's Decision to Admit Contention CL-2 (July 12, 2010) ("Motion for Reconsideration"). For the reasons set forth herein, Staff opposes Applicant's Motion for Reconsideration as the Applicant has failed to satisfy the requirements of 10 C.F.R. § 2.323(e). Accordingly, the Motion for Reconsideration should be denied.

BACKGROUND

On July 2, 2010, the Atomic Safety and Licensing Board ("Board") issued an order that admitted in part Contentions CL-2 through CL-4, which were reformulated and designated as admitted Contention CL-2. See South Texas Project Nuclear Operating Co. (South Texas Project Units 3 & 4), LBP-10-14, 72 NRC __, __ (July 2, 2010) (slip op at 24-33). As admitted, Contention CL-2 alleges that STP Nuclear Operating Company's estimation of replacement power costs in the ER Section 7.5S evaluation of severe accident mitigation alternatives is erroneous. *Id.* at __ (slip op. at 29- 31).

On July 12, 2010, the Applicant filed a Motion for Reconsideration. In the Motion for Reconsideration, Applicant asserts that the admission of Contention CL-2 represents a clear and material error that renders the Board's Order invalid. See Motion for Reconsideration at 1-2.

DISCUSSION

The Motion for Reconsideration was filed pursuant to 10 C.F.R. § 2.323(e) which provides that:

Motions for Reconsideration may not be filed except upon leave of the presiding officer or the Commission, 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.

10 C.F.R. § 2.323(e). With the 2004 revision of § 2.323, the NRC intentionally established a higher standard to permit reconsideration than the then existing standard. See Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004). Specifically, the revised rule is only intended to permit reconsideration where a "manifest injustice" would occur in the absence of reconsideration. *Id.*

In the Motion for Reconsideration, the Applicant asserts that admission of Contention CL-2 by the Board represents a clear and material error that renders the Board's Order invalid. See Motion for Reconsideration at 1-2. According to the Applicant, the Order does not address, and reflects a fundamental misunderstanding of, Applicant's argument that all severe accident contentions should have been dismissed because they involve accidents that are "remote and speculative" under NEPA. See Motion for Reconsideration at 5 (citing Applicant's Answer Opposing New and Revised Contentions regarding Environmental Report Section 7.5S at 5-9 (Jan. 22, 2010)). Specifically, the Applicant asserts that as Contention CL-2 involves events that are "remote and speculative," the admission of Contention CL-2 constitutes a clear and material error under the National Environmental Policy Act ("NEPA"). The Applicant refers to

Commission decisions that “suggested” that a motion for reconsideration “may be appropriate when a party identifies a decision that is inconsistent with NEPA.” See Motion for Reconsideration at 3, n.5. Finally, Applicant asserts that the Board’s failure to reject Contentions CL-2 through CL-4 could result in extending the proceeding. *Id.* at 3.

The Applicant asserts that the Board’s decision is inconsistent with NEPA. *Id.* at 6 (citing *Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-04, 69 NRC 171, 208-209 (2009)). Specifically, the Applicant states that the holding in *Calvert Cliffs* supports its assertion that an environmental report for a new nuclear plant does not need to evaluate the impacts of external events that have a probability of occurrence less than 10^{-6} per year. *Id.*

As additional support, Applicant cites the Board decision in *Comanche Peak* wherein proposed contentions related to severe accident scenarios that had a probability of less than 10^{-6} per year were rejected. See Motion for Reconsideration at 6 (citing *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), LBP-10-10, 71 NRC ___, ___ (June 25, 2010) (slip op. at 25-28, 32-34)).

The Applicant then compares the core damage frequency and large release frequency of the proposed units against this 10^{-6} threshold. Motion for Reconsideration at 7. The Applicant’s argument fundamentally hinges on whether this Board should have applied the 10^{-6} probability threshold set out in *Calvert Cliffs*. *Id.* at 6-7.

Staff disagrees that the Applicant has met the standard for reconsideration. Although the Staff agrees with the Applicant that it appears that the Board did not expressly consider the Applicant’s arguments, the Applicant fails to demonstrate that the Board’s decision admitting Contention CL-2 is in clear error. In support of the Motion for Reconsideration, Applicant cited no clear binding Commission precedent that would compel the Board to accept the Applicant’s argument regarding the threshold of what would constitute a remote and speculative accident.

Rather, the Applicant cited other Atomic Safety and Licensing Board decisions. Atomic Safety and Licensing Board decisions are persuasive but are not binding on other Atomic Safety and Licensing Boards as Atomic Safety and Licensing Boards are only bound to comply with the directives of a higher tribunal. See Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 343 n.3 (1998). See *a/so*, South Carolina Electric and Gas (Virgil C. Summers Nuclear Station Unit 1), ALAB-710, 17 NRC 25, 28 (1983). Therefore, the Applicant has failed to establish that the Board's decision constitutes a clear and material error. Accordingly, the Staff does not believe that the Applicant has made a showing of compelling circumstances that would satisfy 10 C.F.R. § 2.323(e).

CONCLUSION

For the reasons set forth above, Applicant's Motion for Reconsideration should be denied.

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/Signed (electronically) by/

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Executed in Accord with 10 CFR § 2.304(d)

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REQUIRED 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 motion, and that my efforts to resolve the issues have been unsuccessful.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER IN OPPOSITION TO APPLICANT'S MOTION FOR RECONSIDERATION" dated August 2, 2010, has been served upon the following persons by Electronic Information Exchange this 2nd day of August, 2010:

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