UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD PANEL

In the Matter of
South Texas Project Nuclear Operating Co.
Application for the South Texas Project **Docket Nos. 52-012, 52-013**
Units 3 and 4
Combined Operating License **August 2, 2010**

INTERVENOR'S RESPONSE TO APPLICANT'S MOTION FOR RECONSIDERATION OF THE BOARD'S DECISION TO ADMIT CONTENTION CL-2

The Intervenors hereby respond to the Applicant's motion for reconsideration of the Panel's decision in LBP-10-14 to admit Contention CL-2.

Introduction

The Applicant has argued that this Panel's decision to admit Contention CL-2 should be reconsidered and, in effect, reversed. However, the Applicant has not made a showing of compelling circumstances as required under 10 C.F.R. §2.323(e). This Panel's Order admitting CL-2 is not a result of clear error and the Applicant's motion should be denied.

The Panel's Admission of Contention CL-2 is not a clear and material error.

Contention CL-2 was admitted by the Panel in LBP-10-14 as follows:

> 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 because it

> underestimates replacement power costs and fails to consider disruptive impacts, including ERCOT market price spikes. [1]

Contention CL-2 questions the accuracy/adequacy of the Applicant's replacement power costs in the context of the Applicant's SAMDA analysis. The Applicant has argued that the admission of CL-2 was improper because its ER concluded that severe accident scenarios are remote and speculative and that consideration of such under NEPA, 42 U.S.C. §4332 et seq., is unwarranted.[2] The Applicant asserts that this Panel failed to address this aspect of its argument opposing the admission of CL-2.[3]

Contrary to the Applicant's assertion, the Panel's Order did not fundamentally misunderstand a key point in its argument. This Panel was well aware of the Commission's views on NEPA's rule of reason jurisprudence.[4] The assertion that the Panel ignored the Applicant's rule of reason argument in the course of the consideration of the admission of CL-2 overlooks the Panel's recognition of this argument in its Order.[5]

Applicant's objection to the admission of Contention CL-2 is limited to materiality under 10 C.F.R. §2.309(f)(1)(iv).[6] Applicant argues that the Panel has fundamentally misunderstood or disregarded its position that because design basis accidents and severe accidents are relatively

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[1] *S. Tex. Project Nuclear Operating Co.* (South Texas Project Units 3 & 4), LBP-10-14, 72 NRC __, slip op. at 30 (July 2, 2010) ("LBP-10-14").
[2] Applicant's Motion for Reconsideration, pp.1-2, 5-8.
[3] Id.
[4] See eg. LBP-10-14, p. 17, fn.91 that discusses at length the scope of NEPA analyses, remote and speculative risks and the probabilistic rule of reason.
[5] LBP-10-14, pp.28-29, fn. 159. The Order cites to p. 25 of the Applicant's Answer but apparently intended to cite to p. 5 of the Applicant's Answer where there is a discussion of the applicability of NEPA analysis of remote and speculative events. The Panel's citation to this portion of the Applicant's argument shows that the panel was clearly aware of the Applicant's arguments.
[6] Applicant's Motion for Reconsideration, p. 7.

improbable there is no need to consider such in the context of a NEPA analysis.[7] However, as explained by the Panel, Contention CL-2 is material because, at this stage of the adjudication, materiality is a pleading requirement and not a proof requirement.[8]

The Panel's Order in LBP-10-14 determined that CL-2 is material to this adjudication because 10 C.F.R. §51.45(b) requires consideration of alternatives.[9] Additionally, 10 C.F.R. §51.45(c) requires, *inter alia*, consideration of the economic costs associated with the proposed action and alternatives.[10] Moreover, the NRC has recognized that the arguably low probability of severe accidents does not justify eliminating NEPA consideration of SAMDAs in all contexts. [11] The NRC's rejection of a *per se* rule which concludes that risks of all severe accidents are remote and speculative leaves to a case-by-case consideration of whether analyses of low probability, high consequence accident scenarios should be undertaken.

The Panel's Order recognized the general rule that the scope of a NEPA analysis does not require consideration of remote and environmental consequences or discuss events that "have an inconsequentially small probability of occurring".[12] But the predicate to eliminating an event or consequence from a NEPA analysis is an agency finding supported by an adequate record that

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[7] Id.
[8] LBP-10-14, 72 NRC __, slip op. at 32, fn. 182.
[9] LBP-10-14, 72 NRC __, slip op. at 31, fns.175, 176.
[10] *In the Matter of Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 2010 WL 1235387 At 17-18 (remand to determine economic cost issues related to SAMA analysis).
[11] See Licenses, Certifications, and Approvals for Nuclear Power Plants, 72 Fed. Reg. 49,352, 49381 ("As for the perspective that SAMDA evaluations need not be performed for current reactor designs because the severe accident risk for such designs is too remote and speculative, the NRC has already addressed this issue in other contexts. The NRC has considered petitions to eliminate the consideration of SAMDAs previously. The NRC position, both then and now is that it is not prepared to reach the conclusion that the risks of all severe accidents are so unlikely as to warrant their elimination from consideration in our NEPA reviews.") (Emphasis added)
[12] LBP-10-14, 72 NRC __, slip op. at 17, fn. 91(internal citations omitted).

the subject events/consequences are remote and speculative.[13] In this matter, there has been no specific agency conclusion that severe accidents are, *per se*, remote and speculative.[14] This is underscored by the NRC's determination that the risks of severe accidents cannot be considered so unlikely to justify the elimination of the SAMDA analysis from the Applicant's Environmental Report and the NRC's NEPA analysis.[15] This point is illustrated in the relicensing case *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1 (2002). There the Commission admitted a SAMA contention regarding ice-condenser containments notwithstanding the conclusion reached by Duke Energy's ER that none of the subject SAMAs would be cost effective.[16] The Commission explained that if impacts differ among plants then a plant-specific analysis of impacts is required.[17]

In this case, the SAMDAs (a subset of SAMAs) are influenced by the Applicant's replacement power costs. To the extent that the Applicant's ER understates replacement power costs, some SAMDAs would be unjustifiably omitted from consideration with a concomitant negative effect on safety. Replacement power costs are a function of, *inter alia*, market conditions faced by the Applicant and these are peculiar to each plant and its market dynamics. The Applicant in this case would have this Panel assume its replacement power costs are beyond NEPA review even though its particular market conditions have not been addressed in either a generic or specific fashion by the NRC. The effect of such a decision would be to leave intact the

[13] Id. citing *Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Commission*, 869 F.2d 719, 739, 745 (3rd Cir. 1989)
[14] See fn. 5, supra.
[15] LBP-10-14, 72 NRC __, slip op. at 32.
[16] 56 NRC at 4-5.
[17] Id. at 3. "…severe accident mitigation alternatives -SAMAs-generally must be addressed by the Applicant on a plant-specific basis."

ER's projected replacement power costs that have been called into question by the Intervenors' through CL-2 and its supporting expert report.

The Applicant also argues CL-2 was impermissibly admitted because its discussion of economic impacts in the subject ER revisions were not required and for support points to the decision in *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).[18] The *Shearon Harris* decision did not categorically exclude all cost quantifications from ERs. Instead, the decision held that cost comparisons are unnecessary unless an environmentally preferable alternative has been identified.[19] In the instant case, the determination of whether an environmentally preferable alternative has been identified has not been finally adjudicated by this Panel. The Intervenors' DEIS contentions include DEIS 2 that asserts nuclear power is a greater source of greenhouse gases than renewable fuels and DEIS 3 that asserts wind and solar and other renewable fuels, with and without storage, are viable and environmentally preferable alternatives to nuclear power.[20] Accordingly, Intervenors suggest that if the Panel determines that the Applicant's economic impacts in §7.5S are unnecessary because no environmentally preferable alternative has yet been identified, that a decision on the Motion for Reconsideration be held in abeyance until the admissibility of DEIS 2 and 3 is adjudicated.

Additionally, the Applicant's argument it is entitled to relief under 10 C.F.R. §2.323(e) because, if the motion is granted and no other contentions are admitted, the adjudication would

[18] Applicant's Motion for Reconsideration, pp.7-8.
[19] 68 NRC at 577.
[20] Intervenors' Motion for Leave to File New Contentions Based on the Draft Environmental Impact Statement, pp.5-8.

be at an end. This basis for relief is not a compelling circumstance when compared to what 10 C.F.R. §2.323(e) expects, i.e. "the existence of an unanticipated, clear and material error, which could not have been anticipated, that renders the decision invalid."

Finally, the decision to admit CL-2 is not a clear and material error. As earlier noted, the decision in *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1 (2002) anticipates that economic considerations related to SAMAs/SAMDAs are a recognized area of NEPA inquiry. As such, admission of CL-2 that deals with replacement power costs and their effects on SAMDAs is not a clear and material error.

Conclusion

Based on the above and foregoing the Intervenors urge that the Applicant's Motion for Reconsideration be denied.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2010 a copy of "Intervenors' Response to Applicant's 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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