UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael M. Gibson, Chairman
Dr. Gary S. Arnold
Dr. Randall J. Charbeneau

In the Matter of SOUTH TEXAS PROJECT NUCLEAR OPERATING COMPANY (South Texas Project Units 3 and 4)	Docket Nos. 52-12-COL and 52-13-COL ASLBP No. 09-885-08-COL-BD01 August 10, 2010

MEMORANDUM AND ORDER
(Ruling on Motion for Reconsideration of Contention CL-2)

By motion, Applicant South Texas Project Nuclear Operating Company ("STP" or the "Applicant") seeks reconsideration of the Licensing Board's decision to admit Contention CL-2.[1] In our July 2, 2010 memorandum and order, we reformulated and admitted Contention CL-2, which focuses on the Applicant's assessment in its Environmental Report ("ER") of replacement power costs in the event of a forced shutdown of multiple STP Units.[2] The Applicant argues that "compelling circumstances" warrant reconsideration of our decision to admit Contention CL-2 because our memorandum and order did not specifically address the Applicant's argument that any severe accident contentions are predicated upon events that are so "remote and speculative" that they need not be evaluated under the National Environmental Policy Act of

[1] STP Nuclear Operating Company's Request for Leave to File and Motion for Reconsideration of the Board's Decision to Admit Contention CL-2 (July 12, 2010) [hereinafter Applicant's Motion].

[2] LBP-10-14, 72 NRC __, __ (slip op. at 24-33) (July 2, 2010).

1969 ("NEPA").[3] For that reason, the Applicant maintains, the admission of Contention CL-2 is a "clear and material error" under NEPA.[4]

For the reasons described below, the Applicant's motion is denied.

I. Background

In our August 27, 2009 and September 28, 2009 orders, we conferred standing on Intervenors[5] and, inter alia, admitted Contention 21, a contention of omission alleging that the ER for proposed STP Units 3 and 4 did not include required information about the environmental impacts of a radiological incident at existing STP Units 1 and 2 on proposed STP Units 3 and 4, or vice versa.[6] After Contention 21 was admitted, the Applicant revised its ER[7] to add Section 7.5S, "Evaluation of Impacts of Severe Accidents on Safe Shutdown of Other Units"[8] to address the potential environmental impacts of a radiological incident at existing STP Units 1 or 2 on proposed STP Units 3 or 4 (and the effects of an accident at proposed STP Units 3 or 4 on existing STP Units 1 or 2).[9] The Applicant claimed this ER revision cured the alleged omission that gave rise to Contention 21, and so moved to dismiss Contention 21.[10] Intervenors opposed the Applicant's motion to dismiss Contention 21, claiming that new ER Section 7.5S fails to explain how large releases of radiation would interfere with safe shutdown

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[3] Applicant's Motion at 1-2.

[4] Id. at 2.

[5] Intervenors are the Sustainable Energy and Economic Development Coalition, the South Texas Association for Responsible Energy, and Public Citizen.

[6] LBP-09-21, 70 NRC __, __ (slip op. at 36-39) (Aug. 27, 2009).

[7] Letter from Stephen Burdick to the Board, Notification of Filing Related to Contention 21 (Nov. 11, 2009).

[8] Letter from S. Head, STP, to NRC Staff, Proposed Revision to Environmental Report (Nov. 10, 2009).

[9] Id. at 1-9.

[10] Applicant's Motion to Dismiss Contention 21 as Moot (Nov. 30, 2009) at 1, 4.

and how those releases would affect the environmental and economic impacts on co-located units.[11] In addition, Intervenors filed four new contentions challenging new ER Section 7.5S, all of which essentially allege that the Applicant failed to discuss adequately the possible impacts of a severe accident at one of the STP units on the other STP units.[12]

We reformulated three of these contentions, originally pled as Contentions CL-2, CL-3, and CL-4, into Contention CL-2, and admitted it in our July 2, 2010 memorandum and order.[13] Admitted Contention CL-2 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 because it underestimates replacement power costs and fails to consider disruptive impacts, including ERCOT market price spikes."[14]

On July 12, 2010, the Applicant moved for leave to file a motion for reconsideration of our decision to admit Contention CL-2, asserting this Board had inflicted "manifest injustice" by failing to address one argument it had interposed to all of Intervenors' co-location contentions.[15] Specifically, the Applicant argues now, exactly as it did in its answer to Intervenors' co-location contentions, that all of those contentions should be inadmissible because they involve accident scenarios the Applicant claims are "remote and speculative."[16] NRC Staff and Intervenors oppose the Applicant's motion for reconsideration.[17]

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[11] Intervenors' Response to Applicant's Motion to Dismiss Contention 21 as Moot (Dec. 14, 2009) at 3.

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

[13] LBP-10-14, 72 NRC at __ (slip op. at 24-33).

[14] Id. at __ (slip op. at 30).

[15] Applicant's Motion at 2-3.

[16] Id. at 5.

[17] NRC Staff's Answer in Opposition to Applicant's Motion for Reconsideration at 1 (Aug. 2, 2010) [hereinafter NRC Staff Answer]; Intervenor's Response to Applicant's Motion for

II. Analysis

A. Legal Standards for Reconsideration

The standards for a motion for reconsideration are specified in 10 C.F.R. § 2.323(e). The first requirement is that any motion for reconsideration must be filed within ten days of the action for which reconsideration is sought.[18] Such a motion requires leave from the Board and will be entertained only (1) upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, (2) which could not have reasonably been anticipated, and (3) that renders the decision invalid.[19] The 2004 amendments to our rules of practice make clear that a "compelling circumstance" is "a higher standard than the existing case law" as of 2004. In addition, those rule changes were "intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier."[20] The Commission considers reconsideration "an extraordinary action" that should "not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier."[21] Therefore, to successfully petition for reconsideration, the party submitting the motion must demonstrate that the Board committed a clear error in the context of a new argument the party was not able to make previously.[22]

Reconsideration of the Board's Decision to Admit Contention CL-2 (Aug. 2, 2010) at 1 [hereinafter Intervenors' Answer].

[18] 10 C.F.R. § 2.323(e).

[19] Id.

[20] Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004) (emphasis added).

[21] Id.

[22] See, e.g., Tenn. Valley Auth. (Bellefonte Nuclear Power Plant Units 3 and 4), Memorandum and Order (Ruling Regarding Motion for Reconsideration) (Dec. 19. 2008) at 4 (unpublished) (citing Consumers Energy Co., Nuclear Management Co., LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc. (Palisades Nuclear Power Plant), CLI-07-22, 65 NRC 525, 527 (2007)).

B. Discussion

The Applicant's motion for reconsideration fails to meet this exacting standard required for reconsideration. There are no "compelling circumstances" to justify granting the Applicant's motion, nor has the Applicant raised a "claim that could not have been raised earlier." In fact, the Applicant admits that the pleading accompanying its motion is a resubmittal of the same arguments in its answer opposing admission of Intervenors' co-location contentions.[23] However, rearguing facts and rationales that the Applicant discussed in a prior pleading is precisely what the Commission has stated does not constitute "compelling circumstances" to warrant reconsideration.

Moreover, the Applicant has not demonstrated a "material and clear error" in our decision. In arguing otherwise, the Applicant contends Contention CL-2 should not have been admitted because it involves co-location impacts that are too "remote and speculative" to be considered under NEPA.[24] The Applicant argues NEPA's rule of reason dictates that accidents with a probability occurrence of less than 1×10^{-6} per year need not be considered as a matter of law.[25] The Applicant claims that for STP Units 3 and 4, which are Advanced Boiling Water Reactors ("ABWR"), it is "undisputed" that the large release frequency is 2.2×10^{-8} per year from internal events, and that the core damage frequency is 1.6×10^{-7} per year from internal events.[26] Because the probability of a severe accident at an ABWR is below this 1×10^{-6} per year threshold, the Applicant suggests that any "severe accident at STP Units 3 and 4 is remote and

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[23] The Applicant claims that because the Board admitted Contention CL-2 without directly addressing one of the Applicant's generic arguments, this signifies that the Board fundamentally misunderstood its argument. See Applicant's Motion at 2-3. Apparently, the Applicant overlooked our discussion of its arguments in our July order. See LBP-10-14, 72 NRC at __ (slip op. at 28-29). We are well aware of NEPA's rule of reason jurisprudence. See LBP-10-14, 72 NRC at __ (slip op. at 17 n.91).

[24] Applicant's Motion at 5.

[25] Id. at 6.

[26] Id. at 7.

speculative and need not be considered" under NEPA. Because the Applicant maintains the co-location impacts underlying Contention CL-2 are below this range of probability,[27] it contends that Contention CL-2 involves issues not material to this proceeding.[28]

We do not agree. Contrary to the Applicant's claim, it is not so undisputed that the severe accident scenarios underlying Contention CL-2 are "remote and speculative" as a matter of law. Indeed, in their earlier pleadings, Intervenors challenged these exact arguments, stating that "[i]t is not only the statistical improbability of a serious accident that bears on the determination whether, in a given circumstance, a severe accident should be anticipated and thereby considered in the context of the COLA."[29] Intervenors further contend that since September 11, 2001, the probability of severe accidents has been altered, and point out, for example, that the Commission adopted new regulatory requirements to address risks such as terrorist attacks that were once considered too remote and speculative.[30] Intervenors also note that the Applicant has only calculated the occurrence probabilities of severe accidents arising independently at one STP unit. Because the accidents underlying Contention CL-2 are "coupled," Intervenors contend that the Applicant "has not considered at all the dynamics of induced severe accidents, the ER has not estimated these conditional probabilities and hence cannot a priori conclude that they are 'remote and speculative.'"[31]

Thus, Intervenors have established a genuine, material dispute with the Applicant. In deciding whether a contention is admissible, the only question before this Board is whether the

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[27] Id. at 7.

[28] 10 C.F.R. § 2.309(f)(1)(vi).

[29] Intervenors' Consolidated Response to NRC Staff's Answer to the Intervenors' New Accident Contentions and Applicant's Answer Opposing New Contentions Regarding Applicant's Environmental Report Section 7.5S (Jan. 29, 2010) at 6.

[30] Id. at 7.

[31] Id. at 5.

contention meets the requirements of 10 C.F.R. § 2.309(f)(1). As set forth in our July 2, 2010 order, Contention CL-2 meets the Commission's contention admissibility requirements. It is not appropriate at this stage of the proceeding to decide whether NEPA's "rule of reason" requires the Applicant to discuss certain severe accidents, or whether accident scenarios are "remote and speculative." These determinations involve the merits of the contention, which are not to be entertained at this stage of the proceeding.[32]

Moreover, in responding to the Applicant's motion for reconsideration, both Intervenors and the NRC Staff argue the Applicant has not met the standard for reconsideration because the Applicant has cited no binding Commission precedent that would compel this Board to accept its proposition that 1×10^{-6} per year is the probability threshold below which any accident must be deemed to be remote and speculative under NEPA.[33] Intervenors contend further that eliminating an accident scenario from a NEPA analysis (i.e., any severe accident at STP Units 3 and 4) must be supported by an adequate factual record.[34] We agree. Because the Commission has never expressly concluded that severe accidents with a probability occurrence below 1×10^{-6} per year are remote and speculative, we are unwilling to make such a determination without first admitting the contention.[35] Once there is an adequate factual record, the merits of this dispute can be reached.

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[32] See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 548 (1980) (stressing that "it is not the function of the licensing Board to reach the merits of any contention" in deciding the contention's admissibility and whether to grant an intervention petition).

[33] See NRC Staff Answer at 3; Intervenors' Answer at 3-4.

[34] See Intervenors' Answer at 4 (citing Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Comm'n, 869 F.2d 719, 739, 745 (3rd Cir. 1989).

[35] The Board notes that the Applicant included a SAMA analysis for STP Units 3 and 4 in Section 7.3 of its original ER. If the Applicant's claim is correct that NEPA does not require it to evaluate accident scenarios with a probability of 1×10^{-6} per year or less, then the ER should have simply stated that all severe accidents fall under that threshold and no SAMA is required. Instead, the Applicant included the SAMA analysis. Thus, it appears that until recently, the Applicant viewed NEPA to require evaluation of severe accidents at STP Units 3 and 4.

Accordingly, it is not a "clear and material error" to decline to decide, at the contention admissibility phase of this proceeding, whether any accidents at STP Units 3 and 4 are "remote and speculative" as a matter of law. Contention CL-2 raises a genuine, material dispute with the Application, and thus the Board was not "clearly erroneous" in finding it admissible.

As explained above, we note that, in response to the Board's admission of Contention 21, the Applicant added to its ER the analysis that Contention CL-2 challenges—Section 7.5S, "Evaluation of Impacts of Severe Accidents on Safe Shutdown of Other Units."[36] Contention 21 alleged that the impacts from severe radiological accident scenarios on the operation of other units at the STP site have not been considered in the ER.[37] In admitting this contention of omission, we discussed whether NEPA required the analysis to be included in the ER. The Board concluded that Intervenors raised a genuine material dispute over whether the analysis may be required in the ER.[38] By arguing that NEPA never requires the Applicant to analyze severe accidents at STP Units 3 and 4, the Applicant is essentially asking us to revisit our prior contention admissibility decision. We decline to do so.

Finally, denying reconsideration of Contention CL-2 will not, as the Applicant claims, result in a manifest injustice.[39] The Applicant argues that, had we dismissed Contention CL-2, "the proceeding would assume a fundamentally different character" because all previously admitted contentions would likely be dismissed and this proceeding would terminate.[40] In

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[36] Although the Applicant and NRC Staff suggest that Contention CL-2 challenges a SAMDA analysis, in revised ER Section 7.5S, the Applicant did not refer to these evaluations as either SAMA or SAMDA analyses. We note that the evaluations challenged by Contention CL-2 apply equally to both SAMA and SAMDA analyses.

[37] LBP-10-14, 72 NRC at __ (slip op. at 9).

[38] LBP-09-21, 70 NRC at __ (slip op. at 39).

[39] Applicant's Motion at 3 n.6.

[40] Id. at 3.

essence, the Applicant suggests it will suffer manifest injustice if we do not allow this proceeding to terminate. In the first place, while the Applicant may prefer not to have to adjudicate the merits of a contention, such adjudication can scarcely be characterized as manifest injustice. Furthermore, the claim that this proceeding would probably terminate had we denied Contention CL-2 is simply inaccurate. Indeed, the Applicant admits that Intervenors recently filed new contentions related to the draft environmental impact statement ("DEIS"), and this proceeding will terminate only if we deny the admission of Contention CL-2 and decline to admit all of Intervenors' new DEIS contentions.[41]

We therefore deny reconsideration of our decision to admit Contention CL-2.

[41] See id. at 3 n.6 and accompanying text.

III. Order

For the foregoing reasons, the Applicant's motion for reconsideration of Contention CL-2 is hereby denied.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD
/S/

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Michael M. Gibson, Chairman
ADMINISTRATIVE JUDGE

/S/

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Gary S. Arnold
ADMINISTRATIVE JUDGE

/S/

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Randall J. Charbeneau
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 10, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
SOUTH TEXAS PROJECT NUCLEAR OPERATING COMPANY	)	Docket Nos. 52-012-COL and 52-013-COL
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	)	
(South Texas Project Units 3 and 4)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (RULING ON MOTION FOR RECONSIDERATION OF CONTENTION CL-2) have been served upon the following persons by the Electronic Information Exchange.

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, DC 20555-0001

Michael M. Gibson, Chair
Administrative Judge
E-mail: michael.gibson@nrc.gov

Gary S. Arnold
Administrative Judge
E-mail: gary.arnold@nrc.gov

Randall J. Charbeneau
Administrative Judge
E-mail: Randall.Charbeneau@nrc.gov

Kara Wenzel, Law Clerk
E-mail: kara.wenzel@nrc.gov
Wen Bu, Law Clerk
E-mail: wxb3@nrc.gov

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop - O-15 D21
Washington, DC 20555-0001

Marian Zobler, Esq.
Sara Kirkwood, Esq.
Maxwell Smith, Esq.
Michael Spencer, Esq.
Jody Martin, Esq.
Anthony C. Wilson, Esq.
Stephanie Liaw, Esq.
Joseph Gilman, Paralegal
E-mail:
marian.zobler@nrc.gov
Sara.Kirkwood@nrc.gov
jsg1@nrc.gov
maxwell.smith@nrc.gov
michael.spencer@nrc.gov
jody.martin@nrc.gov
stephanie.liaw@nrc.gov
Anthony.wilson@nrc.gov

OGC Mail Center : OGCMailCenter@nrc.gov

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Office of the Secretary of the Commission
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov

Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004
Counsel for the Applicant
Stephen J. Burdick, Esq.
Steven P. Frantz, Esq.
Alvin Gutterman, Esq.
John E. Matthews, Esq.
Mary Freeze, Assistant
E-mail:
sburdick@morganlewis.com
sfrantz@morganlewis.com;
agutterman@morganlewis.com
jmatthews@morganlewis.com
mfreeze@morganlewis.com

Sustainable Energy and Economic Development (SEED) Coalition
Diane Curran
Harmon, Curran, Spielberg, & Eisenberg, LLP
1726 M Street N.W., Suite 600
Washington, DC 20036
E-mail: dcurran@harmoncurran.com

Sustainable Energy and Economic Development (SEED) Coalition
Robert V. Eye, Esq.
Kauffman & Eye
112 SW 6th Avenue, Suite 202
Topeka, Kansas 66603
E-mail: bob@kauffmaneye.com

Sustainable Energy & Economic Development (SEED) Coalition
Eliza Brown, Clean Energy Advocate
1303 San Antonio #100
Austin, Texas 78701
E-mail: eliza.seedcoalition@gmail.com

Southwest Workers' Union
Lanny Alan Sinkin, Esq.
1801 Westlake Drive #212
Austin, Texas 78746
E-mail: lanny.sinkin@gmail.com

[Original signed by Nancy Greathead]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 10th day of August 2010