

**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
Units 3 and 4
Combined Operating License**

Docket Nos. 52-012, 52-013

August 11, 2010

INTERVENORS' RESPONSE TO STAFF'S MOTION FOR SUMMARY DISPOSITION

Pursuant to 10 C.F.R. § 2.1205 and the Panel's Initial Scheduling Order the Intervenors hereby respond to the Staff's Motion for Summary Disposition.

Introduction

The Staff has filed a motion for summary disposition on the sole basis that all severe accident mitigation design alternatives (SAMDA) issues are resolved through the ABWR design certification rule.¹ Intervenors view this motion as raising only a legal issue because the essential factual assertions that underpin the motion are not contested. However, the Staff's legal basis for the motion is faulty because the resolution of environmental issues related to the ABWR design rule is limited to the information in the rule's environmental assessment and related technical support document. The regulatory provision in question, 10 C.F.R. Pt. 52, Appendix A, and Commission case precedent anticipate that SAMDAs are germane to COL adjudications when based on information outside the final environmental assessment for the U.S. ABWR design and the technical support document. Hence, contentions based on the Applicant's Environmental

¹ Staff Motion for Summary Disposition, pp.5,6,9,13,14.

Report, such as the projected cost of replacement power, are proper subject matter in this COL adjudication.

Discussion

The ABWR Design Certification Rule forecloses only contentions that are derived from the environmental assessment and the related technical support document but does not preclude contentions based on the Applicant's Environmental Report.

The Intervenors do not controvert the factual basis for the Staff's motion for summary disposition because the issue raised by the Staff is limited to the legal argument concerning the scope of issues that are deemed "resolved" by the ABWR design rule.²

10 C.F.R. Pt. 52, Appx. A, B. 7. states:

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, amendment of a combined license, or renewal of a combined license, proceedings held under 10 CFR 52.103, and enforcement proceedings 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 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. (emphasis added)

² The factual basis for the Staff's motion is irrelevant because, while the STP site parameters may be within those specified in the technical support document, this circumstance does not address the issue of law concerning whether COL contentions may be based on information based outside the ABWR's environmental assessment or its related technical support document.

The ABWR design rule does not cover issues that are outside the ABWR environmental assessment and Revision 1 of the Technical Support Document. There is nothing in 10 C.F.R. Pt. 52 Appx. A that suggests COL contentions derived from information in the Applicant's ER are foreclosed. Had the Commission intended to also preclude contentions related to information contained in an applicant's environmental report it would have specified such in the regulation.³ This argument is further buttressed by the Commission's recognition that severe accident mitigation alternatives (SAMA)⁴ contentions are admissible in COL adjudications.⁵

The Panel's Order admitting CL-2 discussed the Staff's recognition that consideration of SAMDAs that mitigate the environmental consequences of the proposed action for STP Units 3 and 4 are valid NEPA issues. While the Staff differentiated between STP Units 1 and 2 and Units 3 and 4, Staff, in effect, conceded that SAMDA cost-risk considerations are pertinent NEPA issues related to Units 3 and 4.⁶ Though the argument that the DCD precludes such considerations could have been raised by the Staff in its Answer to the co-location contentions, it was not.

The Staff's argument in its Answer opposing the admission of the co-location contentions recognized that ER information related to SAMDAs that "result in the identification of a cost-beneficial SAMDA" would be material.⁷ And while Staff maintained that the Intervenor had

³ *In the Matter of Hydro Resources, Inc.*, 63 N.R.C. 483,491 (regulations construed to effectuate the intent of the enacting body and such "may be ascertained by considering the language used and the overall purpose of the regulation, and by reflecting on the practical effect of the possible interpretations.") (internal citations omitted); *In the Matter of Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC*, (Calvert Cliffs Nuclear Power Plant, Unit 3) 70 N.R.C. 198, 218 (2009) (Commission would not infer that absence of deferral provision in decommissioning regulation was inadvertent.)

⁴ SAMDAs are a subset of SAMAs.

⁵ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1 (2002) (admission of SAMA contention regarding ice-condenser containments).

⁶ LBP 10-14, 72 N.R.C. ____, slip op .p.29, fns.160,161 citing Staff's Answer to CL Contentions at p. 25.

not actually identified significant inaccuracies in the Applicant's co-location ER revisions, the Panel ruled that at the contention admissibility stage it was sufficient for Intervenors' to have the Johnson report as a basis to argue that "when multiple STP units are shut down, the ER's projection of replacement costs is incorrect or incomplete".⁸

Notwithstanding Staff's prior position that SAMDAs are legitimate NEPA based contentions, it now makes the argument that SAMDAs are off limits because such have been addressed in the DCD. Significantly, Staff's argument that SAMDA contentions that address underlying cost projections are foreclosed by the DCD does not cite any part of the certification rule or technical support document that supports such a conclusion. There is good reason not to preclude contentions that are based on information that is subject to significant change over time, such as costs of replacement power. In contrast, matters such as the STP site characteristics are relatively static and amenable to resolution through the DCD rule the ABWR environmental assessment and its technical support document.

It is noteworthy that Staff acknowledges SAMA analyses are not intended to be a substitute for NEPA analyses of the potential impacts of severe accidents.⁹ And Staff further concedes that material disputes arise if there is a refinement to a SAMA analysis that is both "genuinely plausible" and capable of changing the cost-benefit balance.¹⁰

Because CL-2 raises a material dispute that is tied to the Applicant's ER and does not, *per se*, implicate the ABWR's environmental assessment or its technical support document, a

⁷ LBP-10-14, 72 N.R.C. ____, slip op. p. 29 fn. 162, citing Staff's Answer to CL Contentions at p. 24.

⁸ Id. at 30.

⁹ Staff Motion for Summary Disposition, pp.7-8, 12 citing *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI 10-11, 71 N.R.C. ____ (2010)(slip op. p. 37, 39).

¹⁰ Staff Motion for Summary Disposition, p. 8, citing Pilgrim, slip op. p. 39 and Staff's Answer to CL Contentions, p. 24 (internal citations omitted).

petition under 10 C.F.R. §2.335 is not required.¹¹ The Staff's argument that a 10 C.F.R. §2.335 petition is required is undercut by the fact that replacement power cost projections are not resolved by the ABWR's environmental assessment or its technical support document. And Staff neither argues that such costs have been finally resolved nor cites to a specific portion of the ABWR's environmental assessment or its technical support document that does so.

Staff also concedes that its DEIS has not covered the replacement power costs or any other economic impacts that are within the perimeter of CL-2 and argues that because Intervenor did not file a contention based on this omission that CL-2 should be dismissed.¹² Staff overlooks that the origin of CL-2 is the Applicant's ER not the DEIS. The fact that the Staff omitted any attempt to calculate projected replacement power costs in the DEIS does not alter the Applicant's understatement of such in its ER. Staff's argument would have this Panel foreclose admission of CL-2 not because the Applicant has understated the projected replacement power costs in its ER but because the Staff has omitted such from its DEIS. For purposes of the instant motion, Staff's decision to omit projections of replacement power costs from the DEIS is the functional equivalent of the Applicant's understatement thereof in its ER. Hence, a DEIS contention derived from this omission would not have been based on new information, a prerequisite for DEIS contention admissibility. Contention CL-2's pendency at the time of the Staff's issuance of the DEIS preserved the issue of projected replacement power costs for the Panel's determination notwithstanding the Staff's unilateral decision to omit any discussion of such in the DEIS.

¹¹ Staff Motion for Summary Disposition, p.9.

¹² Staff Motion for Summary Disposition, p.10, fn.9.

Conclusion

Based on the above arguments and authorities the Staff's Motion for Summary Disposition should be denied.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2010 a copy of “Intervenors’ Response to Staff’s Motion for Summary Disposition” was served by the Electronic Information Exchange on the following recipients:

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