

March 30, 2011

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of )  
 )  
NUCLEAR INNOVATION NORTH )  
AMERICA LLC ) Docket Nos. 52-012 & 52-013  
 )  
(South Texas Project, Units 3 & 4) )

NRC STAFF BRIEF REPLYING TO INTERVENORS' ANSWER  
IN OPPOSITION TO THE NRC STAFF'S PETITION FOR REVIEW OF LBP-11-07

INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), the NRC staff (Staff) hereby replies to the Intervenor's answer in opposition to the Staff's petition for review of LBP-11-07 (Intervenor's Answer), filed on March 25, 2011.<sup>1</sup> In LBP-11-07, the Atomic Safety and Licensing Board (Board) denied the Staff Motion for Summary Disposition of Contention CL-2 (Staff Motion), rejecting the Staff's argument that all environmental issues concerning severe accident mitigation design alternatives (SAMDA) were resolved by rule. *Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-11-07, 73 NRC \_\_, \_\_ (Feb. 28, 2011) (slip op. at 23-25, App.). On March 15, 2011, the Staff filed a petition for review (Staff Petition) of the Board's ruling under 10 C.F.R. § 2.341(b), arguing that the Board's ruling was contrary to law. As explained below, the arguments that the Intervenor raise in their Answer are without merit. The Commission should grant the Staff Petition and reverse LBP-11-07.

DISCUSSION

The Intervenor raise several arguments in opposing the Staff Petition. However, as explained below, these arguments are based on erroneous legal or factual premises. The

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<sup>1</sup> On March 24, 2011, Nuclear Innovation North America LLC (Applicant) filed an answer supporting the Staff's petition for review of LBP-11-07.

Intervenors first argue that the “central issue” raised by the Staff Petition is whether replacement power costs were considered in the design certification process, and, if not, whether replacement power costs may form the basis for a contention on the combined license (COL) application. Intervenors Answer at 1-2. The Intervenors assert that replacement power costs were not considered during the ABWR design certification review. *Id.* at 2 & n.6. As the Staff explained, however, replacement power costs were specifically considered and resolved in the “Technical Support Document for the ABWR,” Rev. 1 (TSD).<sup>2</sup> Staff Petition at 16 (citing ABWR TSD at 32-33). In any event, however, and as set forth in the Staff Petition, the ABWR design certification rule resolves *all* environmental issues concerning SAMDAs because the STP site is bounded by the ABWR TSD site parameters. See Staff Petition at 15-17 (citing 10 C.F.R. Part 52, App. A, Sections VI.A. and VI.B.7; 10 C.F.R. § 51.107(c)).

Second, the Intervenors assert that the Staff Petition should be denied because economic costs are germane to SAMDA analyses. Intervenors Answer at 3. However, the Staff did not claim that replacement power costs are irrelevant to SAMDA analyses as a general matter. Rather, the Staff asserted that the issues raised by the Intervenors were resolved in this proceeding because the Applicant references the ABWR design, and all environmental issues concerning SAMDAs for the ABWR design were resolved during the design certification rulemaking. See 10 C.F.R. Part 52, App. A, Section VI.B.7. In addition, the case cited by the Intervenors in support of their argument involved a license renewal proceeding and did not involve an application referencing a certified design, where SAMDA issues are resolved by rule. See *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-11, 71 NRC \_\_

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<sup>2</sup> The design certification applicant’s (GE Nuclear Energy’s) SAMDA evaluation is in the U.S. Advanced Boiling Water Reactor (ABWR) TSD. NEPA/SAMDA Submittal for the ABWR from J.F. Quirk to R.W. Borchardt, attach. 1 (Dec. 21, 1994) (ML100210563). The ABWR TSD’s consideration of replacement power costs was discussed at oral argument and in the Board’s Order. See Oral Argument Tr. at 1041-42 (Oct. 21, 2010); *South Texas Project*, LBP-11-07, 73 NRC at \_\_ (slip op. at 24, App. at 3-4). In addition, the Intervenors, later in their Answer, appear to recognize that the ABWR TSD considered replacement power costs. See Intervenors Answer at 5 (recognizing that General Electric’s generic SAMDA analysis considered replacement power costs).

(Mar. 26, 2010) (slip op.). This case, therefore, is not relevant to the issue of design certification finality in this proceeding.

Third, the Intervenor claim that the National Environmental Policy Act (NEPA) and NRC regulations require consideration of replacement power costs in the event of a forced shutdown of multiple STP units. Intervenor Answer at 3-4. While the Staff agrees that an environmental impact statement (EIS) must consider alternatives to mitigate adverse environmental consequences, SAMDAs were specifically considered for the ABWR and these issues are resolved by rule. See 10 C.F.R. Part 52, App. A, Section VI.B.7.<sup>3</sup>

For their fourth argument, the Intervenor asserts:

While the general rule is that SAMA/SAMDA issues discussed in the DCD and TSD are not material in a COL proceeding, Commission precedent recognizes an exception when there is a plausible basis to conclude that “inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated . . . .”

Intervenor Answer at 4-5 (quoting *Pilgrim*, CLI-10-11, 71 NRC at \_\_\_ (slip op. at 39)). However, as explained above, the *Pilgrim* decision cited by the Intervenor concerns license renewal, not a COL application referencing a certified design. See *Pilgrim*, CLI-10-11, 71 NRC at \_\_\_ (slip op. at 1). The controlling authority for the ABWR SAMDA analysis is the ABWR rule, which provides that the SAMDA analysis is resolved within the meaning of 10 C.F.R. § 52.63(a)(5).

See 10 C.F.R. Part 52, App. A, Sections VI.B & VI.B.7. Section 52.63(a)(5) provides that

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<sup>3</sup> Apart from the issue of design certification finality, the Staff also disagrees that consideration of replacement power costs for multiple units is necessary for a SAMDA analysis to be valid. NEPA does not require the use of the “best scientific methodology” or the use of an alternative methodology just because it is “plainly better.” *Pilgrim*, CLI-10-11, 71 NRC at \_\_\_ (slip op. at 37). NEPA allows agencies to select their own methodologies so long as they are reasonable. *Id.* In addition, NEPA does not demand a fully developed plan for a mitigation analysis. *Id.* at \_\_\_ (slip op. at 38). Because the only goal of a SAMDA analysis is to determine whether there is a cost-beneficial SAMDA, additional factors do not need to be considered unless it looks genuinely plausible that they would change the cost-benefit conclusions reached. See *id.* at \_\_\_ (slip op. at 39). The ABWR SAMDA evaluation is consistent with these principles. As explained in the Staff Petition, the NRC, in support of the ABWR design certification rule, reviewed the TSD and performed an independent evaluation of SAMDAs in an environmental assessment (EA) and concluded that there were no cost-beneficial SAMDAs. See Staff Petition at 11. In the ABWR EA, the Staff also evaluated whether a number of additional or alternative inputs and methods might lead to a different result and concluded that they would not. See *id.* at 24 n.13. This satisfied the NRC’s obligations under NEPA.

matters resolved in a design certification are considered resolved in a later COL proceeding unless a waiver is granted pursuant to 10 C.F.R. § 2.335. See 10 C.F.R. § 52.63(a)(5). The Intervenor did not file a petition for waiver of the rule under 10 C.F.R. § 2.335.<sup>4</sup>

Fifth, the Intervenor claim that the consideration of replacement power costs cannot be resolved by a “one-size-fits-all generic analysis” and that the number of units on site should be considered “to more accurately compute replacement power costs.” Intervenor Answer at 5-6. The ABWR rule, however, is premised on the ability to resolve environmental issues by rule with a generic analysis. In addition, the Commission recognizes that generic analyses can be used to resolve environmental issues by rule. See *Pilgrim*, CLI-10-11, 71 NRC at \_\_\_ (slip op. at 33) (deeming the intervenor’s arguments to be an impermissible challenge to NRC regulations because the generic EIS for license renewal “provides a generic evaluation of potential spent fuel pool accidents”). Finally, as explained above, a SAMDA analysis need not address every conceivable factor to be valid. See *id.* at \_\_\_ (slip op. at 39).

For their sixth argument, the Intervenor assert that a licensing board “is justified in conducting an independent analysis when the Staff’s review is incomplete or insufficiently explained.” Intervenor Answer at 6 (citing *Exelon Generation Co. (Early Site Permit for Clinton ESP Site)*, CLI-05-17, 62 NRC 5, 45 & n.99 (2005)). However, *Clinton ESP* does not support the Intervenor’s position. *Clinton ESP* simply recognizes that licensing boards should make independent judgments based on the evidence in the record and reiterates that boards should not conduct “independent basic research” or duplicate Staff analyses. *Clinton ESP*, CLI-05-17, 62 NRC at 45 & n.99 (citing *Consumers Power Co. (Midland Plant, Units 1 and 2)*, ALAB-123, 6 AEC 331, 335 (1973)). The *Midland* decision cited by *Clinton ESP* addressed in further detail what a licensing board should do if it finds the Staff review to be incomplete or insufficiently

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<sup>4</sup> The Intervenor also argue that their dispute with the Applicant’s Environmental Report (ER) SAMDA analysis is not amenable to summary disposition because there are conflicting expert opinions. Intervenor Answer at 5. As explained in the Staff Petition, however, the Intervenor’s dispute with the ER SAMDA analysis is moot because all SAMDA issues are resolved by rule. See, *generally*, Staff Petition.

explained, including the possibility that the licensing board would direct that the record be further developed. *Midland*, ALAB-123, 6 AEC at 335. Accordingly, *Clinton ESP* is consistent with the Commission's precedents, cited in the Staff Petition, that place the burden of presenting evidence on the parties to a proceeding. See Staff Petition at 15 n.10. Finally, *Clinton ESP* involved a licensing board making a determination after a hearing as opposed to a determination on a summary disposition motion. The Intervenor's do not address the Staff's primary argument that the Commission's summary disposition standards do not contemplate a Board creating its own independent evaluation to prove that a movant's *uncontested* statements of material fact are incorrect. See Staff Petition at 15 n.10 (citing 10 C.F.R. § 2.710(a); *Pilgrim*, CLI-10-11, 71 NRC at \_\_ (slip op. at 13)).<sup>5</sup>

#### CONCLUSION

The Board's decision in LBP-11-07 is based on legal conclusions that are without governing precedent and contrary to established law. The arguments raised by the Intervenor's in opposition to the Staff Petition do not support denial of the Staff Petition. For these reasons, the Commission should accept review of and reverse LBP-11-07.

Respectfully submitted,

**/Signed (electronically) by/**

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Dated at Rockville, Maryland  
this 30th day of March 2010

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<sup>5</sup> The Staff also notes that although the Intervenor's claim that the Board included replacement power costs as a relevant site parameter, Intervenor's Answer at 7, the Board's site parameter list does not include replacement power costs. See *South Texas Project*, LBP-11-07, 73 NRC at \_\_ (slip op., App. at 4).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC Staff Brief Replying to Intervenors' Answer in Opposition to the NRC Staff's Petition for Review of LBP-11-07" have been served upon the following persons by Electronic Information Exchange this 30th day of March 2011:

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